

IN THE UNITED STATES DISTRICT  
FOR THE DISTRICT OF VERMONT

MISTY BLANCHETTE PORTER, M.D., )  
 )  
Plaintiff, )  
 )  
vs. )  
 ) CASE NO. 2:17-cv-194  
DARTMOUTH-HITCHCOCK MEDICAL )  
CENTER, DARTMOUTH-HITCHCOCK )  
CLINIC, MARY HITCHCOCK )  
MEMORIAL HOSPITAL, and )  
DARTMOUTH-HITCHCOCK HEALTH, ) Closing Arguments  
 )  
Defendants. ) Jury Charge  
 )  
----- )

Continuation of trial held on Tuesday, April 8,  
2025, at 8:30 a.m., Burlington, Vermont, before  
Honorable Kevin J. Doyle, Magistrate Judge.

Clerk of Court: Emerson F. Howe

Sarah M. Bentley, CCR-B-1745  
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I N D E X

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P R O C E E D I N G S

(The following took place in open court without the jury present.)

THE CLERK: Your Honor, the matter before the court is Civil Case No. 17-cv-194, Misty Blanchette Porter vs. Dartmouth-Hitchcock Medical Center, et. al.

Present on behalf of the plaintiff are Attorneys Geoffrey Vitt, Eric Jones, and Sarah Nunan.

Present on behalf of the defendants are Attorney Tristram Coffin, Morgan McDonald, and Donald Schroeder.

This morning we're here for a charge conference.

THE COURT: Okay. Good morning. So just to confirm for the record that all parties have received the revised copy of the jury instructions.

Plaintiff?

MR. JONES: Yes, we received it.

THE COURT: And defendants?

MR. SCHROEDER: Yes, your Honor.

1 THE COURT: Okay. So at this time I'll  
2 give you an opportunity, if you'd like, to kind  
3 of make any objections to the instructions as  
4 received last night.

5 I'll also tell you that you'll have  
6 another opportunity after the charge is  
7 administered to the jury to make any objections  
8 to the charge as given, meaning the way it was  
9 read.

10 But, if you would, I'll leave it up to  
11 you as to what you'd like to do to preserve your  
12 objections. If you'd like to say anything now,  
13 feel free.

14 Plaintiff?

15 MR. JONES: We have no objections to the  
16 proposed instructions. One I just wanted to  
17 address with the Court is we noticed that on the  
18 proposed jury verdict form there was a revision  
19 made of plaintiff damages, to strike the  
20 reference to New Hampshire law.

21 THE COURT: Right.

22 MR. JONES: And so I had understood from  
23 our conversation yesterday that there was a  
24 sense that enhanced compensatory damages were  
25 similar, not the punitive. They would kind of

1 be dealt with together. If that's not the case,  
2 then I do think now we do the enhanced damages  
3 instructions, if we're separating out. I think  
4 it could be very simple. We could put it right  
5 after the punitive damages section.

6 I think it could be as simple as, If you  
7 find for plaintiff on the New Hampshire claim,  
8 you may award enhanced compensatory damages for  
9 wanton, malicious, or oppressive conduct,  
10 something like that.

11 THE COURT: So you're correct that it  
12 doesn't address that, and that was -- first,  
13 there really wasn't much in the way of law  
14 provided on this topic. It seems like enhanced  
15 compensatory kind of came up yesterday, frankly.

16 MR. JONES: Right.

17 THE COURT: They weren't asked for in the  
18 proposed instructions from the plaintiff.

19 Some legal research done on it yesterday,  
20 maybe the parties are aware of this, but there's  
21 certain kind of questions that have been raised  
22 about the credibility of those particular  
23 damages in New Hampshire.

24 There was a federal court case from a few  
25 years ago, I believe it's McPatten, where the

1 district judge in that case was addressing the  
2 application of this particular damages provision  
3 in New Hampshire and ultimately ended up asking  
4 certification from the New Hampshire Supreme  
5 Court on this topic. And several of the  
6 questions listed in the certifications order  
7 from the district judge I think are relevant  
8 from what we have going on here. It appears the  
9 case settled before the New Hampshire Supreme  
10 Court could answer the certified questioning.

11 So this was kind of my thinking at this  
12 point and on this -- is this a jury question,  
13 too, or is it a court question?

14 At least the plain language of the  
15 statute talks about how the Court may so, you  
16 know, frankly this really was omitted from the  
17 instructions because it just seems like there is  
18 a lot of unknowns about that. And the issue, as  
19 I say, really only percolated to the surface  
20 yesterday, and that's why it was omitted.

21 But, so with that said, is plaintiff then  
22 objecting to the fact that it's not included?

23 MR. JONES: Yes, your Honor.

24 THE COURT: Okay.

25 Defendants on that topic?

1 MR. COFFIN: I think the Court's approach  
2 to that is practical. There doesn't seem to be  
3 a lot of law on it, and the statute does speak  
4 to the Court decision.

5 THE COURT: All right. So I'll leave it  
6 the way it is. Again, if there is other  
7 authority provided to the Court, I would suggest  
8 that it is appropriate here. Of course I will  
9 review that, but none that you found and none  
10 was provided.

11 Anything else from plaintiffs in that  
12 regard?

13 MR. JONES: Nothing further, your Honor.

14 THE COURT: Okay.

15 The defendants?

16 MR. COFFIN: We had just a couple brief  
17 items, your Honor.

18 THE COURT: Yes.

19 MR. COFFIN: First of all, on Page 9,  
20 under the topic of corporate acts through its --  
21 corporation acts through its employees, I  
22 thought we had agree to an insertion of the term  
23 advisory Dartmouth health employee as to any.  
24 That seems to have not have made it into the  
25 draft.



1 THE COURT: To say that a corporation  
2 acts through its supervisory employees.

3 MR. COFFIN: Therefore, the act -- I  
4 thought we had agreed that the term any  
5 supervisory.

6 We had suggested, you know, management  
7 level or upper level and various formulations,  
8 and I thought we had landed on the modifier  
9 "supervisory" to be put in there, and it did not  
10 appear to have made it in there.

11 THE COURT: Right. So there's the  
12 question of -- you know, there's the question of  
13 liability for the corporation, which probably  
14 can't be premised on just the act of an employee  
15 versus an act of a supervisor. This  
16 instruction, the intention here was to make a  
17 much more general point. Corporations act  
18 through people, just in terms of corporate acts,  
19 which I see as separate from the notion of  
20 liability based on acts.

21 MR. COFFIN: Very good. I just raise  
22 that only as -- I wasn't sure if that was an  
23 intentional measure or not and, of course, it  
24 was planned.

25 THE COURT: Anything else?

1 MR. COFFIN: Yes, briefly as well.

2 On Page 13, third line down from the top,  
3 I thought we had said, agreed to again language  
4 that we had. The modifier "suitable" position  
5 in front of the word "position". Other  
6 position, where it says there is no other  
7 position. I thought we had agreed that the term  
8 "suitable" was going to be inserted there.

9 I think that does track the statute and  
10 the instructions the Court would intend to  
11 agree. It isn't just any position. It's a  
12 particular kind of position.

13 THE COURT: Okay. I don't recall that  
14 being an agreed-upon change.

15 Was it, plaintiffs?

16 MR. JONES: I don't recall it being.

17 THE COURT: And then the --

18 MR. COFFIN: Okay, I'm corrected. We  
19 don't think it was agreed upon. I apologize.

20 THE COURT: Okay.

21 MR. COFFIN: But we would assert that  
22 that is an appropriate modifier.

23 THE COURT: Okay. So I'm going to leave  
24 that charge as it is.

25 Mr. Coffin, anything else?

1 MR. COFFIN: Yes, one final thing, Judge.

2 On page -- on the mitigation of damages  
3 section, which begins on Page 30 and spills over  
4 to 31, this is all past in terms of if you find  
5 that Dr. Porter failed to do such-and-such, then  
6 which requires sort of a preliminary finding  
7 that she failed to do.

8 You know, our proof and our argument to  
9 the jury is that she did mitigate her damages,  
10 so that it's kind of a threshold question of  
11 whether she failed to do something or not  
12 doesn't necessarily come up in a way that's  
13 confusing to the jury. And we'd like some sort  
14 of an assertion there that says basically if you  
15 find the plaintiff mitigated her damages, that  
16 that should be deducted from the damages award.

17 And rereading some of the cases on our  
18 motion last night actually prompted me to think  
19 that I think that is something that is required  
20 under the law for the instruction to say  
21 something like -- just to make it clear to the  
22 jury that if you find mitigation, that should be  
23 deducted. And then, you know, sort of making  
24 them preliminarily find whether she did or did  
25 not abide by the term "mitigate".

1           So what I would say is, you know, that  
2           last sentence above the punitive damages award,  
3           something along the lines of, If you find that  
4           she did mitigate damages, you may reduce your  
5           award accordingly.

6           THE COURT: So I'm just a little unclear  
7           about -- this argument was made yesterday, too.  
8           So affirmative defense in the case was failure  
9           to mitigate. The discussion yesterday about  
10          severance agreement and things related to that  
11          seems to suggest failure to mitigate.

12          What I'm hearing yesterday and today is  
13          that Dartmouth's position is that she mitigated?

14          MR. COFFIN: Well, it is, and that was  
15          clearly our position at trial because she got  
16          hired for a well-compensated subspecialty  
17          position at an eminent academic teaching  
18          hospital and was making, within a few years, we  
19          would assert, more money than she was at  
20          Dartmouth.

21          And so really she did mitigate her  
22          damages, you know, by perhaps 2021 but call it  
23          2025, and Dr. Bancroft's chart, of course,  
24          having had her losses continuing on until her  
25          retirement age at Age 70.

1           And so like our position is that she --  
2           it wasn't a question of whether she failed to or  
3           not. She did mitigate her damages, and we  
4           shouldn't be attributed to having those  
5           continuing damages into perpetuity. That's just  
6           not allowed.

7           THE COURT: Mr. Jones?

8           MR. JONES: Your Honor, I think that  
9           argument yesterday and today confuses an  
10          argument that there was no loss but the issue of  
11          mitigation of damages.

12          If they want to argue that there was no  
13          loss for those reasons that's one thing, but the  
14          proposed change in the language that they've  
15          made confuses the whole defense of failure to  
16          mitigate. As you mentioned, comes under the  
17          failure to mitigate. So I don't think it would  
18          be appropriate to make that position.

19          THE COURT: That is my concern, too. I'm  
20          just not going to make that change to that  
21          particular instruction.

22          All right. Anything further from the  
23          defendants on that?

24          MR. SCHROEDER: No, your Honor. We  
25          incorporate all of the objections that we put on

1 the record yesterday, including but not limited  
2 to the case law relating to the ADA,  
3 specifically Section 12111 and the fact that an  
4 employer can only be held to a reasonable  
5 accommodation or reassignment to a vacant  
6 position, as the statute says and as the five  
7 circuit cases, including the 2nd Circuit, have  
8 said already.

9 THE COURT: All right. Well, then that  
10 concludes that portion. As I've said, you'll  
11 have an opportunity after the instructions are  
12 given to list any additional objections at that  
13 time.

14 Okay, and then I'll turn now to the  
15 plaintiff's motion to preclude any reduction of  
16 damages based on conditional offer of severance  
17 pay.

18 So having heard the arguments yesterday  
19 and considering this, I think that it would be  
20 inappropriate to comment on the severance  
21 agreement. To the extent I don't know what the  
22 defendants might actually argue so I can't  
23 really speak specifically to perhaps what the  
24 intention is. But would you like to let me  
25 know, or I can give you my thoughts on it first?

1 Mr. Schroeder?

2 MR. SCHROEDER: Sure, your Honor. I want  
3 to make sure we're clear on that.

4 The evidence in the record is that C-13,  
5 I believe, I'm certainly going to reference it  
6 because C-13 was given after the meeting, which  
7 arguably was part of the interactive process.

8 You may recall Dr. Porter said, Well, I  
9 set up a meeting with Amy Claiborne. She then  
10 sends the May 25th letter, and then on May 26th  
11 she meets with Ms. Claiborne. And that's the  
12 genesis of that.

13 There's a couple things. First of all,  
14 the severance agreement is admitted in evidence.

15 THE COURT: Right.

16 MR. SCHROEDER: And they didn't object to  
17 it, and we can't undo that, unring that bell.  
18 So I don't intend to discuss it in the context  
19 of mitigation of damages --

20 THE COURT: Okay.

21 MR. SCHROEDER: -- but it's certainly  
22 something that was presented to her, and she  
23 rejected it.

24 They can make their arguments as to why  
25 she rejected it, that's fine, but the bottom

1 line is she asked for it in that meeting. And  
2 in fact, the letter says that she asked for more  
3 severance.

4 THE COURT: Okay.

5 MR. SCHROEDER: And that's all wrapped up  
6 in that chronology of events. She argued, and  
7 this goes to lack of malice, et cetera, and also  
8 just to intent, right?

9 THE COURT: Lack of malice. You said  
10 this yesterday, too. So when you say lack of  
11 malice, meaning that Dartmouth was making an  
12 effort to reach some type of a severance  
13 agreement with her?

14 MR. SCHROEDER: Exactly, just like they  
15 did with the other two physicians at the time.

16 THE COURT: Okay, but the argument during  
17 closing is not going to be -- I just want to be  
18 really clear -- it's not going to be making the  
19 point that if they should find damages, it's  
20 going to be reduced by the amount of the  
21 severance agreement?

22 MR. SCHROEDER: No, I have no intent of  
23 saying that, your Honor.

24 THE COURT: Okay.

25 MR. SCHROEDER: But I want to come back



1 to the fact that this document, I certainly have  
2 the ability to discuss it as much as I want, I  
3 believe, in terms of admitted evidence into the  
4 record, and it relates exactly to the chronology  
5 of events.

6 It actually rebuts many of the things  
7 that Dr. Porter testified to. I never talked to  
8 anybody. Never talked to anybody. Well, no,  
9 actually you did. You talked to the head of HR.

10 THE COURT: Okay.

11 MR. SCHROEDER: So I want to know that I  
12 have free reign to at least talk about the  
13 document, not its import in terms of damages,  
14 but I do want to know that I don't have to go  
15 rewrite my closing to deal with the fact that  
16 I'm addressing -- and I'm going to put it on the  
17 screen. Admit it an exhibit. We're not going  
18 to have a PowerPoint, but we're going to put in  
19 exhibits on the screen, and I want to make sure  
20 that I have full carte blanche to discuss what  
21 he said in that agreement.

22 THE COURT: Okay. I understand your  
23 argument. I appreciate that. Thank you.

24 So plaintiff, ultimately the memorandum  
25 concludes by saying the mitigation issue, it

1           should not be -- they should not be allowed to  
2           talk about the severance agreement to the extent  
3           that damages are found to reduce the damages  
4           amount. So based on that proffer, what we  
5           talked about in closing, that seems then to  
6           be -- what's your view on that?

7           MR. JONES: No, I agree. Our request was  
8           that it simply not be brought up for the  
9           purposes of saying that there should be an  
10          offset or a reduction of the damages by that  
11          amount.

12          THE COURT: All right. So then it sounds  
13          like we have clarity on this.

14          Mr. Schroeder, just to be clear then,  
15          your discussion of the document, as you said in  
16          the ways that you have described, will be fine.  
17          We're just talking about the mitigation of the  
18          damages issue and the amount of the severance  
19          agreement.

20          MR. SCHROEDER: Understood.

21          THE COURT: Okay.

22          MR. SCHROEDER: Just on that subject,  
23          your Honor, and I don't want to put the cart  
24          before the horse here, but on the issue of  
25          talking about the cross-examination of

1 Dr. Bancroft, I realize we're not putting the  
2 chart as a demonstrative and it's not in  
3 evidence, but I want to make sure I'm okay to  
4 discuss, and I believe I am, the  
5 cross-examination and to the extent that he was  
6 asked to make figures that he may not agree  
7 with, but they actually show that if he did an  
8 apples-to-apples comparison, you know, she's  
9 actually making more at UVM. And that's really  
10 the import of that.

11 I'm not -- I'm not going to be putting  
12 any documents up or anything in that regard or  
13 even showing the numbers, for that matter. But  
14 that was what I understood you were saying  
15 yesterday, and I just wanted to make sure.

16 THE COURT: Yes. That was my intention.

17 Mr. Jones?

18 MR. JONES: I think that that's fine  
19 except to the extent that part of that  
20 cross-examination was examining Dr. Bancroft on  
21 the issue of whether he considered the severance  
22 amount and, if she had taken that amount,  
23 wouldn't have that reduced her damages. That  
24 was the genesis of our motion.

25 THE COURT: Okay.

1 MR. SCHROEDER: That's a completely  
2 separate topic. We're talking about the issue  
3 of going to UVM at a 1.0 FTE as opposed to  
4 Dartmouth-Hitchcock, which is where he did his  
5 damages, at a 1.0, and then incorporates it at  
6 .75 magically in July of 2025, and so that's the  
7 issue.

8 I'm not talking about the severance issue  
9 this in that regard.

10 MR. JONES: That's fine.

11 THE COURT: That sounds fine to me, too.

12 Anything -- so you mentioned PowerPoints,  
13 so you're not doing a PowerPoint?

14 MR. SCHROEDER: No, your Honor. The only  
15 thing we would show on the screen are admitted  
16 exhibits as I reference them and that's it. And  
17 just listening to me.

18 THE COURT: Okay.

19 Anything else from the plaintiffs to take  
20 up at this point?

21 MR. JONES: Nothing further, Judge.

22 THE COURT: So just generally, talking  
23 more about the jury once they get the case, I  
24 just want to kind of give you a sense of kind of  
25 what I'll be telling them.

1           So in terms of how long they deliberate,  
2           you know, I can tell them or probably will tell  
3           them that it's up to them. If they want to  
4           deliberate into the night they can but they  
5           don't have to, is what I plan on telling them.

6           And that if they decide to kind of stop  
7           deliberating for the evening, they should send a  
8           note, let us know. I'll bring them back in,  
9           give them kind of the admonishments that I have  
10          been giving each day at trial; just about not  
11          talking about it, not doing any research. Also,  
12          not doing any research in the jury room, like  
13          those kinds of topics.

14          And then I'll tell them to come back. If  
15          they come back tomorrow, come back at 9:00 in  
16          the morning, like they would for kind of any  
17          other day. And then, obviously, the contact  
18          between all of us and them will be basically  
19          zero unless we get a note from them.

20          It will come as no surprise to you if I  
21          do get a note from the jury I'm not going to  
22          deal with it. I'm going to come back here and  
23          first talk to you, unless it's something  
24          extremely minor like can we have an extra  
25          notebook. I'll make sure they get an extra

1 notebook, but anything greater than that I'll  
2 talk to counsel about any notes received.

3 Any objections to that kind of procedure?

4 MR. JONES: None.

5 MR. SCHROEDER: No objection, your Honor.

6 THE COURT: Okay. Well, I'm not sure if  
7 everyone is here. We do have a few minutes so  
8 I'll just briefly step off, and we'll be ready  
9 to go as soon as they all get here.

10 (End of conference without the jury  
11 present at 8:55 a.m.)

12 THE CLERK: All rise.

13 (Honorable Doyle entered the courtroom.)

14 THE CLERK: Please be seated.

15 (Brief pause.)

16 THE CLERK: All rise for the jury.

17 (The jury entered the courtroom.)

18 THE CLERK: Please be seated.

19 Your Honor, the matter before the Court  
20 is Case Number 17-cv-194, Misty Blanchette  
21 Porter vs. Dartmouth-Hitchcock Medical Center,  
22 et al.

23 Present on behalf of plaintiffs are  
24 Attorneys Geoffrey Vitt, Eric Jones, and Sarah  
25 Nunan.

1 Present on behalf of the defendants are  
2 Attorneys Tristram Coffin, Morgan McDonald, and  
3 Donald Schroeder.

4 We are here for a jury trial.

5 THE COURT: Okay. Good morning, Members  
6 of the Jury, and welcome back.

7 I'll ask you, as we always do, since we  
8 were last in court last week have you heard  
9 anything about this case?

10 Have you researched the case in any way,  
11 or have you spoken to anyone about the case?

12 Okay, I see no hands raised.

13 So, Members of the Jury, we're now going  
14 to be hearing closings arguments from the  
15 attorneys. And the rules, so to speak, are as  
16 follows.

17 So the plaintiff will argue first, and  
18 then the defendants will have an opportunity.  
19 After the defendants are done the plaintiff will  
20 have an opportunity to make a short rebuttal  
21 argument. In other words, the plaintiff has the  
22 burden of proof so the plaintiff gets to argue  
23 first.

24 Okay. Plaintiff, you may proceed.

25 MS. NUNAN: Good morning.

1 THE JURY: Good morning.

2 CLOSING ARGUMENT ON BEHALF OF PLAINTIFF:

3 MS. NUNAN: Dr. Porter's disability and  
4 her whistleblowing activities caused her to lose  
5 the job that she loved, the job that she held  
6 for 21 years.

7 When Dr. Porter heard reports of nurses,  
8 residents, nurse practitioners, ultrasound techs  
9 and other doctors, reports of Dr. Hsu and  
10 Dr. Seifer's incompetence, endangering patients,  
11 she had a duty to report. She spoke up often  
12 and loud. She hounded Dr. DeMars as chair of  
13 the department. She put it all in writing.

14 In addition, despite her best efforts to  
15 work as much as possible while she was  
16 recovering, Dr. Porter's disability made her  
17 extraordinary skills worthless to Dr. DeMars and  
18 Dr. Merrens. Quote, Everyone is also  
19 remembering Misty as a full-time employee,  
20 wearing three hats and not the one that's been  
21 out for almost 18 months, Dr. DeMars wrote.

22 In response to this and other astonishing  
23 statements in that e-mail about Dr. Porter's  
24 disability, Dr. Merrens wrote back that this was  
25 a thoughtful and appropriate insight.



1           Individuals as well as corporations have  
2           choices when things go sideways. They can look  
3           at a situation and they can do what they can do  
4           to remedy it, to fix it, to make it right, or  
5           they can choose to double down on their initial  
6           position, deny responsibility, and find somebody  
7           to blame. Dartmouth Health had chosen the  
8           latter. Eight years has elapsed since it made  
9           the decision to close the REI division.

10           When you heard last week from Maria  
11           Padin, Daniel Herrick, Josselyn Chertoff, and Ed  
12           Merrens, they were all the same lines. Closing  
13           the REI division was the right decision in 2017,  
14           and it's the right decision now. The decision  
15           to terminate Dr. Porter was the right decision  
16           in 2017, and it's the right decision now.

17           It was not the right decision. Dr. Julia  
18           MacCallum described in detail the harm that  
19           Dr. Hsu caused in the OR. Sharon Parent told  
20           you her moral compass was going off the charts  
21           when she watched Dr. Seifer perform the  
22           procedures. She had been in the REI division  
23           for 17 years at that point. Both women reported  
24           what they saw to multiple superiors, and yet  
25           Dr. Merrens still claims, I'm not aware of

1 actual harm.

2 Dr. Hsu performed a procedure on Eunice  
3 Lee six months and one day after Dartmouth  
4 Health was in possession of Dr. Porter's 11-page  
5 assessment of him, stating that he should not be  
6 performing such procedures. He caused harm.

7 Dartmouth Health did not ask  
8 Dr. MacCallum on the stand about the harm she  
9 saw in the OR. Dartmouth Health did not ask  
10 Sharon Parent about the details of Dr. Seifer's  
11 harm in the procedure room. Silence.

12 Instead, Dartmouth Health dug up everyone  
13 who Dr. Porter has annoyed in the past 15 years.  
14 What did we hear? That Dr. Porter refused to  
15 use a paper intake form when there was a  
16 perfectly good electronic system available. She  
17 preferred her own tools and her own approach.  
18 She was abrupt with some people. Her standard  
19 of care was too high. She stood up to  
20 Dr. Reindollar. She did not want her schedule  
21 e-mailed to Dr. Seifer.

22 This is what Dartmouth Health chose to  
23 investigate and present to you. Not seeking out  
24 the patients who did not give informed consent  
25 to Dr. Hsu; not looking into the free IBF cycles

1 that were given out to compensate for Dr. Hsu's  
2 mistreatment; not looking into the excessive  
3 pain claims or the statements by Dr. McBean that  
4 Dr. Hsu's surgical skills endangered patients.

5 The deal. Maria Padin described to us  
6 the role of the credentialing committee as  
7 verifying a broad list of qualifications about a  
8 candidate. She said when someone applies to be  
9 part of the medical staff, there's a process  
10 that you want to validate that what they say  
11 they can do and who they say they are is actual,  
12 and part of this is checking on their letters of  
13 recommendation from their last employer.

14 What we heard was that in the spring of  
15 2016 Dr. Seifer did not meet this criteria. The  
16 e-mail sent to the credentialing committee by  
17 his prior provider stated, quote, I either had  
18 to fire the rest of the division or find a new  
19 role for Dr. Seifer because he was not going to  
20 be successful at leading the division.

21 There had been complaints about  
22 Dr. Seifer. They could not comment on his  
23 surgical skills, but they did note that he had  
24 substandard ultrasound skills. Maria Padin  
25 admitted there were red flags.

1           The members of the credentialing  
2           committee -- Maria Padin, Joselyn Chertoff, Ed  
3           Merrens -- should have denied Dr. Seifer the  
4           right to proceed. Instead, a deal was struck.  
5           The deal was that Dr. DeMars could hire  
6           Dr. Seifer, but she had to ensure his success.  
7           As Ed Merrens pointedly told Leslie DeMars;  
8           Dr. Seifer's success is on you. This put into  
9           motion, predictably, the inevitable coverup when  
10          Dr. Seifer turned out to have all the red flag  
11          qualities and concerns raised during the  
12          credentialing committee.

13          This shifted the responsibility of the  
14          assessment and the success of Dr. Seifer away  
15          from the committee onto Dr. DeMars. With her  
16          job on the line, who would expect Dr. DeMars to  
17          report honestly when she received almost  
18          immediate negative reports on Dr. Seifer's  
19          skills? They knew in the summer of 2016.  
20          Dr. DeMars knew in July, 2016.

21          She reported in a private text; quote,  
22          I'm not sure DS is clinically competent. I  
23          don't know what he's been doing for 25 years,  
24          but I'm not sure it's IVF.

25          Eight weeks earlier she had been given

1 full report on Dr. Hsu. Leslie DeMars did  
2 nothing to restrict Dr. Hsu or Dr. Seifer's  
3 practice. They were allowed to continue, until  
4 the closure of the division one year later, to  
5 perform procedures on women; women like Eunice  
6 Lee.

7 There's been a lot of testimony in the  
8 last two weeks, and there's a pile of documents  
9 that we've put together. My job this morning is  
10 to provide you with a roadmap to address the  
11 various claims and testimony in these exhibits.  
12 Let's get started.

13 I'm going to walk through the claims.  
14 Dr. Porter's first claim is for whistle-blowing  
15 retaliation. She asserts she was not terminated  
16 and not reassigned because she reported conduct.  
17 She reported the conduct of Dr. Hsu and  
18 Dr. Seifer, conduct that she reasonably  
19 considered to be illegal, fraudulent, unethical  
20 and harmful to patients. To prevail on that  
21 claim, Dr. Porter must demonstrate the following  
22 elements.

23 One, Dr. Porter in good faith reported  
24 what she reasonably believed was a violation of  
25 law or legal rule.

1 Two, Dartmouth Health terminated  
2 Dr. Porter's employment and failed to reassign  
3 her.

4 And, three, there is a causal connection  
5 between Dr. Porter's reports and her termination  
6 without reassignment.

7 The evidence Dr. Porter presented during  
8 this trial supports a finding in her favor of  
9 those elements. Here we go.

10 For number one, Dr. Porter made multiple  
11 reports raising concerns about patient harm and  
12 unlawful conduct that Dr. Hsu and Dr. Seifer  
13 were causing.

14 First, she reported substantial  
15 medical -- substandard, excuse me, medical care  
16 causing patient harm, including the fact that  
17 they were not following the ASRN standards. She  
18 reported procedures without patient consent.  
19 She reported there was improper billing going on  
20 and that Dr. Seifer and Dr. Hsu were ordering  
21 excessive testing.

22 Dr. Porter tried to stop Dr. Seifer from  
23 using sperm that was possibly contaminated with  
24 Zika. This was a situation that had been  
25 preventable from the start, and she tried to get

1 Dr. Seifer and Dartmouth Health's risk  
2 management to follow the most recent Zika  
3 guidelines to avoid harm to the future fetus.  
4 These were the concerns that needed to be raised  
5 and addressed. When Dartmouth-Hitchcock did not  
6 respond, Dr. Porter blew her whistle louder and  
7 more persistently. She did not stop.

8 Number two. Dartmouth Health terminated  
9 Dr. Porter and failed to reassign her.  
10 Dr. Porter was terminated on May 4th, 2017, as  
11 you will see in Exhibit 50-A, we hope. Please  
12 look at the highlighted parts.

13 As evidenced in Exhibit 50-A, in April,  
14 on April 21st of 2017, in the plans listed,  
15 there is a column for the current staff in which  
16 Dr. Porter was listed as 0.4 GI ultrasound/REI.  
17 And then on the right hand, in the column that  
18 says future staff with complete REI shutdown,  
19 this is the scenario in which they put  
20 Dr. Porter, with 0.4 GYN/ultrasound.

21 Dr. Porter was already doing  
22 non-fertility IVF work, non-fertility REI, REI  
23 work, and she could have easily been reassigned  
24 to do the work she was already doing in the  
25 OB/GYN department.

1 Exhibit 52. Dr. DeMars was annoyed and  
2 dismissive and discredited Dr. Porter's  
3 complaints. She wanted Dr. Porter to be quiet,  
4 but Dr. Porter was a thorn in her side.  
5 Dr. DeMars acknowledged in this e-mail, the  
6 highlighted part at the bottom, We could have  
7 offered her ultrasound-only position, but  
8 keeping her out of any real building plans would  
9 be impossible. She wouldn't be quiet.

10 Further, on the second page of  
11 Exhibit 52, Dr. DeMars stated that her life  
12 would be easier if Dr. Porter lost her license,  
13 and her testimony at trial confirmed this.

14 Exhibit 89, Dr. DeMars states on the  
15 second page, on the second page, As much as it  
16 hurts to say, it was the right decision to  
17 include her in the terminations. I don't want  
18 to change that decision. If I had tried to  
19 make -- if I had made a decision to try to keep  
20 her, I think that Heather, our new nurse  
21 supervisor, and our other administrator would  
22 have quit because she's tried to intimidate each  
23 of them and they are done with the behavior.

24 Dr. Porter in good faith reported  
25 problems to Heather Gunnell and Katie Mansfield,



1 as reported here, the new nursing supervisor.  
2 Dartmouth Health has tried to minimize  
3 Dr. Porter's reports and complaints, but there  
4 were other people that came before you that  
5 corroborated Dr. Porter; Nurse Sharon Parent,  
6 Dr. MacCallum, Dr. George, Dr. Russell, and  
7 Ultrasound Tech Janice Gonyea. They all spoke  
8 to the harm or the unconsented treatment given  
9 by Dr. Hsu.

10 Dartmouth Health brings up during the  
11 trial this idea that there were complaints by  
12 others in the department about Dr. Seifer and  
13 Dr. Hsu, specifically referring to the feedback  
14 in the fall of 2016 and the spring of 2017, in  
15 response to Dr. DeMars's request for feedback.  
16 They keep saying, Well, these people complained,  
17 and we didn't fire them. They still have no  
18 explanation for why they ignored all of these  
19 people. And Dr. Porter was the one who  
20 persistently, persistently would not stop  
21 bringing these issues to the forefront.

22 The third element that I brought up at  
23 the beginning, making a causal connection  
24 between Dr. Porter's reports and her termination  
25 without reassignment. In Exhibit 60,

1 Dr. Merrens brings up and admits that  
2 dysfunction was a reference to Dr. Porter's  
3 complaint. He brings this up in his testimony  
4 as well. Dr. Merrens says, Well, on the surface  
5 we are pinning the dissolution of our  
6 reproductive endocrinology program on our  
7 failure to maintain and recruit nurses for this  
8 work. It is ultimately the dysfunction of the  
9 physicians who worked in this area for years, as  
10 well as recent hires.

11 Dr. Merrens' testimony. He was asked, So  
12 you state it was ultimately the dysfunction of  
13 the physicians and ultimately a failure of  
14 leadership for which I hold Leslie fully  
15 accountable.

16 Closing the REI division and firing all  
17 the providers was an extraordinary act. It had  
18 never been done before.

19 In Exhibit 52 you will see that Amy  
20 Giglio says, We've never closed a service at D-H  
21 before. This was so extraordinary it can only  
22 be explained as discriminatory or retaliatory in  
23 its motive.

24 Dartmouth Health argued in its opening  
25 statement that it was a reduction in force and

1 that all three doctors were treated equally.  
2 This doesn't make sense.

3 Dartmouth-Hitchcock had two incompetent  
4 doctors that were causing harm, and they had  
5 Dr. Porter who was world renown for her  
6 ultrasound skills, her complex surgical skills,  
7 and she is the one that tried to stop the harm  
8 and clean up the mess created by others, but  
9 their argument is they treated them all the  
10 same. Talk about throwing the baby out with the  
11 bath water.

12 Wrongful termination under New  
13 Hampshire's law. Dr. Porter also claims  
14 wrongful termination under the common law of New  
15 Hampshire. For this claim she prevails if she  
16 shows, one, Dartmouth Health's termination of  
17 her employment was motivated by bad faith,  
18 malice, or retaliation.

19 Dartmouth Health terminated Dr. Porter's  
20 employment because she performed one or more  
21 acts that public policy would encourage. We  
22 submit that the evidence we discussed under the  
23 previous whistleblower claim also supports this  
24 claim, this common law claim.

25 Finally, I want to turn to the disability

1 discrimination claim. Dr. Porter alleges  
2 disability discrimination, a failure to  
3 accommodate, and retaliation was in violation of  
4 several laws, including two federal laws, a New  
5 Hampshire state law, and a Vermont law. The  
6 claims are very similar under each one of these  
7 laws, so I will address them all at once.

8 Number one, under these laws an employer  
9 may not terminate an employee because of an  
10 employee's disability.

11 Two, in addition, an employee may show a  
12 violation of law if the employer failed to  
13 provide reasonable accommodation.

14 Finally, three, the disability laws  
15 prevent an employer from retaliating against an  
16 employee for seeking a reasonable accommodation.

17 The evidence that supports the disability  
18 discrimination. Dr. Porter testified that  
19 Dr. Ed Merrens stated three times during her  
20 termination meeting, quote, Stay out on  
21 disability, Misty. During his testimony  
22 Dr. Merrens did not deny the fact that he  
23 referenced her disability during that meeting.

24 Three. Dr. Porter told Dr. DeMars in the  
25 parking lot -- this is her testimony -- You

1 could have kept me, meaning she could have been  
2 reassigned. Dr. Porter testified that  
3 Dr. DeMars said in response, I couldn't have  
4 because of your disability. That would have  
5 compromised your long-term disability.  
6 Dartmouth Health did not put on testimony  
7 opposing Dr. DeMars on this point.

8 You saw the testimony of Dr. Russell, who  
9 stood up and asked Dr. Merrens in the  
10 post-closure OB/GYN meeting why Dr. Porter had  
11 not been kept out to do her non-infertility  
12 work. Dr. Merrens referred -- Dr. Merrens'  
13 response referred to Dr. Porter as being on  
14 disability. Dr. Russell remembers this comment  
15 because she was the one that asked the question,  
16 and she was absolutely stunned that he would say  
17 that in a public meeting.

18 All Dartmouth Health has offered in  
19 response were witnesses that could not recall  
20 the statement. Further evidence of disability  
21 discrimination is on Exhibit 83. If you  
22 remember, Victoria Maxfield wrote to  
23 Dr. Merrens, asking why Dr. Porter could not be  
24 kept on for all of her non-infertility work.

25 In response to Victoria Maxfield's

1 e-mail, Dr. Merrens writes, As you know,  
2 Dr. Porter currently works at 20 percent of her  
3 time. This is a reference to her disability.

4 In Exhibit 89, Dr. DeMars writes to  
5 Dr. Merrens, again, quote, Everyone also is  
6 remembering Misty as a full-time employee  
7 wearing three hats and not the one who has been  
8 out for almost 18 months.

9 On Page 2, Dr. DeMars writes, Misty's  
10 medical disability has been devastating, and I'm  
11 not sure that she should or will really ever be  
12 able to do the complex hysteroscopy or  
13 laparoscopy that she once did. That being said,  
14 there are few full-spectrum REI docs that could  
15 bring similar surgical skills, but they're hard  
16 to find. I think the best outcome of this  
17 termination is a chance for Misty to actually be  
18 out on leave with no intervening  
19 responsibilities so she can assess how much  
20 improvement she might gain. This is a clear  
21 reference to her disability.

22 Dr. Porter's disability was a significant  
23 reason for Dartmouth Health's decision to fire  
24 her and not reassign her.

25 I'd like to talk for a minute about the

1 denial of reassignment and the denial of the  
2 interactive process.

3 When an employee has a disability, an  
4 employer may have a duty to make a reasonable  
5 accommodation. The discussion to explore the  
6 possible accommodation is called an interactive  
7 process. You will hear an explanation of this  
8 law.

9 If the employer knows or should have  
10 known that the employee was disabled, the  
11 employer is obligated to engage in an  
12 interactive process with the employee to  
13 determine whether the possible reasonable  
14 accommodation exists. Both employer and  
15 employee must cooperate in this interactive  
16 process in good faith.

17 We submit Dartmouth Health did not even  
18 attempt to participate in the interactive  
19 process with Dr. Porter. They brought her into  
20 a room and told her she was fired.

21 Further evidence of lack of engaging in  
22 the interactive process is, if you look at  
23 Exhibit B-12, Dr. Porter wrote a letter after  
24 her termination telling Dartmouth Health  
25 administrators that she was willing and able to

1 work in other capacities at Dartmouth Health,  
2 and they would not engage in the interactive  
3 process.

4 There was no testimony by Dartmouth  
5 Health witnesses about engaging in the  
6 interactive process with Dr. Porter. There was  
7 testimony from Dr. Merrens. He stated he did  
8 not ask Dr. Porter if she was interested in  
9 staying on in a non-infertility capacity.

10 There was the testimony of the following  
11 women: Dr. Julia MacCallum, Victoria Maxfield,  
12 Dr. Michelle Russell, and Dr. Karen George all  
13 spoke to Dr. Porter's non-infertility  
14 reproductive endocrinology skills and her  
15 ultrasound skills and her benign complex  
16 surgical skills that were needed in the summer  
17 of 2016 in the D-H OB/GYN department.

18 If you look at Exhibit 96, Emily Baker  
19 states that they had lost GYN ultrasounds, and  
20 it was very much needed and that the radiology  
21 department was no substitute.

22 If Dartmouth Health had engaged in the  
23 interactive process, the parties would have  
24 likely found a reasonable accommodation.  
25 Dartmouth Health made no effort whatsoever to



1 explore these options with her. This failure is  
2 a refusal to accommodate and violates the  
3 disability laws.

4 I want to talk for a minute about who the  
5 decisionmaker was. You have heard, and you will  
6 hear, Dartmouth Health said Dr. Merrens was the  
7 only decisionmaker. They assert that  
8 Dr. Merrens did not know about Dr. Porter's  
9 complaint of Dr. Hsu and Dr. Seifer or the  
10 details of her disability. There is evidence  
11 that disputes those assertions, and I will  
12 discuss those in a minute.

13 This argument does not help Dartmouth  
14 Health avoid the liability for the actions of  
15 Dr. DeMars. Both Dr. Merrens and Dr. DeMars  
16 were senior administrators, and when they acted  
17 they were acting on behalf of Dartmouth Health.  
18 So if either took an action that resulted in an  
19 adverse employment action against Dr. Porter,  
20 Dartmouth Health is responsible. From this  
21 perspective it does not matter who the ultimate  
22 decisionmaker was. They both had the ability to  
23 bind the institution.

24 Let's talk about the evidence. Let's  
25 talk about Dr. DeMars as the decisionmaker; the

1 evidence that Dr. DeMars either made the  
2 decision or significantly recommended the  
3 termination of Dr. Porter.

4 If you look at Exhibit 83, at the top  
5 Dr. Merrens attributes the decision to  
6 Dr. DeMars. Quote, The recommendation around  
7 the closing of the program and its staff were at  
8 the recommendation of Dr. DeMars. You'll  
9 remember that almost immediately after writing  
10 this e-mail Dr. Merrens turns around and writes  
11 to Leslie DeMars in Exhibit 89. He asks how to  
12 better answer the questions that he's receiving.  
13 If he had been the sole decisionmaker, why would  
14 he have needed to ask Dr. DeMars?

15 In Exhibit 89 Dr. DeMars responds, As  
16 much as it hurts, it was the right decision to  
17 include her in the terminations. I don't want  
18 to change that decision. If I had made the  
19 decision to try to keep her -- and then she goes  
20 on to list negative consequences. This is the  
21 answer of someone who's made a significant  
22 contribution to the decision, if not made the  
23 decision itself.

24 Dr. Merrens, at the top of Page 1 in  
25 Exhibit 89, responds to these statements. He

1 says, I think it's a comprehensive, thoughtful,  
2 and appropriate insight. Thanks for taking the  
3 time to do this. Ultimately, once the dust  
4 settles, we'll be in a better position with all  
5 of this, including Misty.

6 When shown his deposition transcript,  
7 Dr. Merrens was asked if he had made the  
8 following two statements. He acknowledged he  
9 did.

10 The first statement was, quote, Leslie  
11 was ultimately the person that made the  
12 decision. And the second statement was, This  
13 was a decision we supported after looking at the  
14 information. This is further evidence that  
15 Dr. DeMars and Dr. Merrens were responsible for  
16 this decision.

17 Next we move on to pretext. Dartmouth  
18 Health claims it had a legitimate business  
19 reason to close the REI division, to fire all  
20 the REI doctors and to not reassign Dr. Porter.  
21 We maintain that this is not true.

22 The evidence presented in this trial  
23 shows that Dartmouth Health's reason is a  
24 pretext and that the real reason was retaliation  
25 for Dr. Porter's whistleblowing and

1 discrimination based on her disability.

2 When thinking about pretext, you look at  
3 Exhibit 60. Amy Giglio responds to Ed Merrens  
4 on May 2nd. She says, Let's discuss this in the  
5 morning. I appreciate your candor and  
6 recognition of the issues. PR here is very  
7 sensitive, it goes without saying. We need to  
8 manage the internal and external message --  
9 messaging and issues.

10 So you're going to see a lot in the  
11 record of messaging, internal and external, and  
12 talking points.

13 This is the same concept used by  
14 Dr. DeMars when asked by Dr. Merrens how to  
15 better respond to the heartfelt messages he was  
16 receiving.

17 At the bottom of Page 89, Dr. DeMars  
18 candidly answers, quote, What's the talking  
19 point? My suggestion is we are working with  
20 each physician on their employment options as  
21 well as what's best for D-H and D-H OB/GYN. I  
22 don't know how you say, quote, I understand  
23 you're angry, but this decision was made in the  
24 best interest of the division and Misty. Even  
25 if it's the truth, no one will buy it at the

1 moment.

2 External messaging and talking points.  
3 What Dr. Merrens says in public to the public is  
4 spin. It's polished spin, but it's spin  
5 nonetheless that serves the best interest of the  
6 corporation. It's not always the truth.

7 How do you know that Dartmouth Health's  
8 reason is pretext? First, Dartmouth Health  
9 keeps changing the reason. This alone is  
10 evidence of pretext. Second, the reasons that  
11 they give are inconsistent. Again,  
12 inconsistency is evidence of pretext. Third,  
13 some of the reasons, like when COE Conroy says  
14 that it's due to declining birth rates, were  
15 reasons that even Dr. Merrens said were not  
16 true. Some of these reasons were just not  
17 supported by the evidence.

18 I want to talk for a minute about the  
19 evidence that goes against the idea that the  
20 nursing shortage was the official reason for  
21 closing the REI division. The list is long; my  
22 apologies.

23 Sharon Parent gave one year's notice that  
24 she was leaving. This was her testimony. That  
25 would have been in December of 2015. She told

1           them it would take six months to train the REI  
2           division nurse.

3           When you look at the documents that  
4           Dartmouth Health put in front of you about  
5           approval of the nursing, you will note that  
6           those documents are dated November of 2016; one  
7           month before Sharon Parent leaves, one year  
8           after she gave notice, or 11 months after she  
9           gave notice.

10          It's Dr. Porter's testimony that she has  
11          knowledge of what the REI division has done in  
12          the past when they've been down on nurses, and  
13          she offers up solutions.

14          Dr. Porter also testified that the IVF  
15          nurses had specialized training, but there was a  
16          whole other group of nurses who could support  
17          the REI services that were non-IVF. Victoria  
18          Maxfield was one of those nurses. There were  
19          others.

20          Dr. Porter testified that only 10 to  
21          20 percent of what the REI division did was IVF.

22          Victoria Maxfield testified that she was  
23          one of a group of nurses who supported  
24          Dr. Porter in the non-IVF capacity in the REI  
25          division. She also stated until her e-mail,

1 Exhibit 83, that during the past five to six  
2 years I have also been her GYN surgical nurse,  
3 taking care of all of her post-op patients due  
4 to the staffing issues in REI. Again, further  
5 evidence that other nurses were capable of  
6 supporting the REI division.

7 You've seen plenty of testimony that what  
8 Dr. Porter did was not just infertility work.  
9 You also heard the testimony of Sharon Parent,  
10 who said she was willing and able to come back  
11 to work after her retirement not only to work as  
12 a nurse in the REI division but also to train  
13 and support less experienced nurses.

14 Sharon Parent said she had done her due  
15 diligence about how to return in a per diem  
16 fashion. She returned near the end of the  
17 90 days and spoke to Heather Gunnell and Katie  
18 Mansfield but was rebuffed.

19 You'll note in Exhibit 23 that Dr. McBean  
20 worked -- Dr. McBean, who you'll remember worked  
21 per diem in the REI division, wrote a review of  
22 Dr. Seifer regarding his technical skills, his  
23 standard of care, and his leadership.

24 If you look at the bottom of the first  
25 page of 23, you will see that she says,

1 Dr. Seifer was disrespectful to Sharon as she  
2 prepared for retirement. After Casey was  
3 unexpectedly let go, we were critically  
4 shorthanded. Sharon has both the depth of  
5 knowledge and the long-term clinical experience  
6 necessary to help solve this problem and train  
7 our newest nurse. She was willing to stay and  
8 help in a more limited basis but was  
9 marginalized and not encouraged to continue  
10 working. We are now in a crisis situation.

11 You also heard the testimony of  
12 Dr. Merrens that he was aware that Sharon Parent  
13 had offered -- he was unaware, excuse me -- he  
14 was unaware of the fact that Sharon Parent had  
15 offered and was willing to come back.

16 If you turn to Exhibit 60, please.  
17 Dr. Merrens writes, While on the surface we are  
18 pinning the dissolution of our reproductive  
19 endocrinology program on the failure to maintain  
20 and recruit nurses for this work, it is  
21 ultimately the dysfunction of the physician who  
22 worked in this area for years, as well as recent  
23 hires, and ultimately a failure of leadership,  
24 for which I hold Leslie fully accountable. The  
25 fact that failures of such programs due to



1 nursing shortages are not common and will be  
2 referring patients to a similar rural academic  
3 REI center in Burlington, Vermont will make our  
4 explanation to the public, patients and media,  
5 well, rather thin.

6 Dr. Porter testified that there were  
7 other -- there was a nurse from another unit  
8 that spoke to her about coming and working in  
9 the REI division. Sharon Parent testified that  
10 Leslie DeMars interfered and told her she was  
11 protecting her by keeping her from coming back.

12 I would like to turn to other evidence of  
13 pretext. In Exhibit 60, I just read to you a  
14 moment ago that Dr. Merrens wrote, While on the  
15 surface we're pinning the dissolution of our  
16 reproductive endocrinology program on the  
17 failure to maintain and recruit nurses for this  
18 work, it is ultimately the dysfunction of the  
19 physicians who worked in this area for years, as  
20 well as recent hires.

21 If you look at Exhibit 103, Dr. Merrens  
22 writes, Regrettably, Vermont Public Radio  
23 published an article yesterday indicating I made  
24 comments to the effect that the program was  
25 being ended due to interpersonal issues amongst

1 the physicians. Nothing could be further from  
2 the truth.

3 Dr. Merrens also stated in his testimony  
4 that Leslie was the architect of the  
5 dysfunction.

6 Dr. Conroy stated that there were  
7 declining birthrates and that was the reason  
8 that the REI division had closed. All of these  
9 arguments are pretext for what was really going  
10 on.

11 They closed the REI division and  
12 terminated all of the providers as a clever  
13 solution to getting rid of three problem  
14 physicians.

15 I'd like to turn next to the damages  
16 section. If you find in favor of Dr. Porter on  
17 any of her claims, then your next task will be  
18 to consider and award appropriate damages.

19 In this case Dr. Porter is seeking  
20 damages to compensate her for her financial  
21 losses and to re-dress her emotional distress.  
22 In addition, Dr. Porter is asking you to award  
23 punitive damages.

24 Economic losses. With regard to economic  
25 losses for Dr. Porter, you may award damages for

1 any lost earnings that Dr. Porter suffered in  
2 the past and any probable loss of ability to  
3 earn money in the future. You heard from  
4 Economist Dr. Bancroft. He analyzed these types  
5 of losses. We're going to pull up Exhibit 1-B,  
6 the chart.

7 Dr. Bancroft summarized his opinions in  
8 this chart. This is where he calculated  
9 Dr. Porter's losses by being terminated from  
10 Dartmouth Health. His methodology was  
11 relatively simple. He started with what  
12 Dr. Porter would have earned had she been  
13 allowed to continue her career at Dartmouth  
14 Health. Then he compared that to what she had  
15 already earned and what she was likely to earn  
16 going forward at UVM.

17 He made conclusions about the amounts  
18 Dr. Porter would need to receive in order to be  
19 made whole for Dartmouth Health's wrongful  
20 conduct.

21 You may consider Dr. Porter's expected  
22 work life when calculating her losses. You  
23 heard Dr. Porter say that she plans to work  
24 until she's 70. That would be until 2033. If  
25 you find that testimony credible, then you can

1 go to the bottom of the page, the bottom line on  
2 the chart and look in the far right column for  
3 Dr. Bancroft's calculation of what her losses  
4 are. As you will see, he calculates that figure  
5 to be 1,787,722.

6 When Mr. Coffin cross-examined  
7 Dr. Bancroft, he suggested that if you changed  
8 the numbers used in the analysis, then the  
9 conclusion is different. That would seem  
10 obvious, but that misses the point. Because if  
11 you use accurate numbers, then you get an  
12 accurate conclusion. I submit that Dr. Bancroft  
13 used accurate numbers.

14 You have also heard throughout this trial  
15 that lawyer math is suspect. So when you hear  
16 about the calculator math done at the stand with  
17 Mr. Coffin's calculator and his framework, I  
18 would encourage you to think about whose math  
19 you want to follow; the lawyer or the economist.

20 Remember, when doing Mr. Coffin's  
21 calculation, Dr. Bancroft stated, I'll do it,  
22 but this is not correct.

23 Please show Exhibit 1-B, Page 4.

24 Dr. Bancroft prepared a chart showing the  
25 extraordinary expenses that Dr. Porter incurred

1 by having to commute to Burlington from Norwich.  
2 To make her whole, we request an award to  
3 compensate her for those expenses as well. The  
4 amount is \$366,553.

5 Duty to mitigate. Dartmouth Health  
6 argues that Dr. Porter's damages should be  
7 limited because of what is called a duty to  
8 mitigate. You will hear that when someone is  
9 seeking damages to compensate them for losses,  
10 they have what is called a duty to mitigate  
11 damages. But this duty only applies to those  
12 damages that Dr. Porter could have avoided with  
13 reasonable effort and without undue burden or  
14 expense. She's not required to undertake  
15 extraordinary measures.

16 So in this case Dr. Porter had a duty to  
17 take reasonable steps to minimize or reduce her  
18 losses. The evidence shows that she complied  
19 with this duty by taking a job at UVM.  
20 Dr. Porter testified she was on long-term  
21 disability and could not get a loan to be able  
22 to set up her own IVF clinic in the Upper  
23 Valley. The robotic equipment with which she  
24 does her complex surgeries are only available at  
25 big teaching hospitals at UVM or Boston -- like

1 UVM or Boston, excuse me. So for her to do her  
2 work, she had to relocate to either Boston or  
3 Burlington.

4 Being a 1.0 FTE, however, would require  
5 her to move. Dr. Porter testified that in order  
6 to keep her household running, her home in  
7 Norwich, she needed to be home at least one day  
8 a week so 0.8 was all she could handle.

9 She has deep roots in the Upper Valley  
10 community where she lives. The house that she  
11 and her husband built, her husband's  
12 multigenerational business that he runs in our  
13 community all made it impractical for her to  
14 move to Burlington, and it would not be  
15 reasonable to expect her to move to Burlington.  
16 She has done all she can to mitigate her losses.  
17 Dr. Porter maintains that there should be no  
18 further reduction in her damages.

19 You will hear from Dartmouth Health that  
20 she should have taken a 1.0 FTE job, but this  
21 would not have been practical unless she moved.  
22 And she's not required to move just to mitigate  
23 her damages because that would be unreasonable  
24 and an extraordinary burden and expense.

25 Two more sections.

1           Emotional distress. In addition to  
2 damages for economic losses, Dr. Porter seeks  
3 damages for her emotional distress. You may  
4 award damages for noneconomic harm, such as loss  
5 of enjoyment of life, mental anguish, anxiety,  
6 humiliation, and other mental or emotional  
7 distress.

8           The following evidence was put on during  
9 this trial that Dr. Porter, indeed, suffered  
10 emotional distress.

11           I'd like to start with Dr. Porter first.  
12 It was her testimony that being fired caused her  
13 to cry all summer. She was clinically  
14 depressed. She ended up grinding her teeth to  
15 the point she ended up with a tooth abscess, and  
16 that had to be repaired.

17           Being away from her family, the  
18 uncertainty of it all, having to drive to  
19 Burlington and stay in a hotel while dealing  
20 with all of these emotions by herself. She was  
21 away from her family, she was away from her  
22 Dartmouth Health work colleagues. It was awful.

23           All of this time she was still working to  
24 recover from her disability. It was pretty  
25 quite admirable, actually. You heard Julia

1 MacCallum testify that she witnessed Dr. Porter  
2 the summer after she was terminated. You heard  
3 her talk about the crying. You heard her talk  
4 about the emotional turmoil. You heard her talk  
5 about receiving a phone call and Dr. Porter's  
6 state of mind after she returned -- she received  
7 that phone call.

8 Dr. Porter testified that she had been  
9 asked to walk a colleague through doing a HyCoSy  
10 procedure over the phone after she was  
11 terminated. The colleague had never done the  
12 procedure before, and it was -- a patient of  
13 hers was put on the schedule.

14 You heard Michelle Russell testify that  
15 Dr. Porter would annually show up and pick  
16 raspberries in her patch. She said that 2017  
17 was memorable because Dr. Porter was crying and  
18 try to wrestle with what had happened to her at  
19 Dartmouth Health. According to Dr. Russell,  
20 Dr. Porter was, indeed, distressed.

21 We leave it to your collective wisdom to  
22 determine the amount of damages to compensate  
23 Dr. Porter for her noneconomic loss.

24 Final section of damages is punitive.  
25 Dr. Porter seeks an award of punitive damages.



1 Punitive damages are meant to punish a defendant  
2 for its clearly outrageous conduct and stop  
3 others from acting in a similar manner in the  
4 future. You may award punitive damages if you  
5 find Dartmouth Health's conduct was outrageous.  
6 That means morally deserving the blame.

7 And if you find that Dartmouth Health  
8 acted with malice in deciding whether a  
9 corporation acted with malice, you may consider  
10 the actions of its managers who acted on behalf  
11 of the corporation. Dr. Porter submits that  
12 these standards have been met in this case.

13 The evidence of ill will and malice. In  
14 Exhibit 52 you saw that Leslie DeMars wrote, My  
15 life and messaging would be easier, and then a  
16 little farther on, if essentially Dr. Porter  
17 lost her license to practice medicine.

18 Dr. DeMars claimed to be a friend of  
19 Dr. Porter's, and yet she not only put this in  
20 Exhibit 52, she said it on the stand. She stood  
21 by what she said; that, yes, it would have made  
22 her life easier if Dr. Porter had lost her  
23 license.

24 Dr. DeMars in Exhibit 89 stated that she  
25 chose not to change her decision. Quote, As

1 much as it hurts to say, it was the right  
2 decision to include her in the decision -- in  
3 the termination, and I do not want to change  
4 that decision.

5 Most disturbing are the comments about  
6 Dr. Porter's disability in Exhibit 89. The  
7 comments about the three hats and nobody  
8 remembering that she's been out. The comments  
9 about her disability being devastating and she  
10 needed to go away and figure out what she could  
11 actually do. The fact that Dr. Merrens  
12 responded to this; that it was appropriate and  
13 thoughtful insight. That's outrageous.

14 Also outrageous is the fact that the  
15 responsibility of the credentialing committee  
16 was circumvented; that Dr. Merrens told  
17 Dr. DeMars that Dr. Seifer's success was, quote,  
18 on you and he, therefore, created the incentive  
19 for Dr. DeMars to cover up the clinical  
20 incompetence and ignore patient harm.

21 The administrators of Dartmouth Health  
22 were put on notice of patient harm, and they  
23 took no action to restrict Dr. Seifer and  
24 Dr. Hsu from performing procedures or protecting  
25 patients from harm.

1 Dr. Merrens testified that Dartmouth  
2 Health offered Dr. Hsu and Dr. Seifer placement  
3 services after being terminated to help them  
4 find now employment. He passed the problem  
5 along.

6 Daniel Herrick testified that they did  
7 not fire doctors for cause but closed the  
8 division instead. For the women who were  
9 harmed, like Eunice Lee, for the women with the  
10 procedure without consent, and for the woman who  
11 was impregnated with a thyroid problem who lost  
12 her baby, these were all outcomes that we submit  
13 could have been prevented. That's outrageous.

14 Dr. DeMars, in her FPTE of Dr. Seifer,  
15 whitewashed all of Dr. Porter's comments. She  
16 used Dr. Hsu to evaluate Dr. Seifer when he  
17 clearly -- when she clearly had information in  
18 the 11-page assessment that he should not be  
19 doing the procedures himself. She used him to  
20 assess Dr. Seifer, and the credentialing  
21 committee allowed it.

22 In the summer of 2016 you had an 11-page  
23 assessment of Dr. Hsu by Dr. Porter stating that  
24 he could not do this work, and you had a text  
25 message on July 28 from Leslie DeMars stating

1           that Dr. Seifer was clinically incompetent. And  
2           yet they allowed these individuals to perform  
3           procedures on women for the following year.  
4           This is outrageous.

5           These women were paying out-of-pocket and  
6           were desperate to get pregnant. You saw in one  
7           of those e-mails where Dr. Porter was pointing  
8           out how poor the pregnancy rates were for 2016.

9           If you decide that it was the right  
10          decision, if you decide that Dr. Porter -- I'm  
11          sorry, excuse me. If you decide that these  
12          statements, this evidence is outrageous, you can  
13          award punitive damages.

14          Conclusion. Finally.

15          Dartmouth Health had a choice as to how  
16          it handled the REI division issues and closure.  
17          It chose what probably seemed at the time as a  
18          clever solution. There were consequences to  
19          these choices. There was harm caused to  
20          patients. There was harm caused to the  
21          community.

22          I keep coming back to the testimony of  
23          Daniel Herrick. Why are we applying car  
24          manufacturer processes to women's healthcare?  
25          Daniel Herrick could not tell you how many women

1 and girls his decisions impacted. Where does  
2 that leave you?

3 When you go back to the jury room to  
4 deliberate, this becomes your case, too. This  
5 is where you get to write the final chapter.  
6 You get to decide what happened, who you  
7 believe, and what harm was caused. Then you get  
8 to decide an appropriate remedy for Dr. Porter.

9 Unfortunately this case does not give you  
10 an opportunity to remedy the harm to patients,  
11 but you do have a chance to make Dartmouth  
12 Health think twice before it turns the other way  
13 the next time patients receives -- it receives  
14 reports of harm by its medical staff.

15 Thank you.

16 THE COURT: Okay. At this time we'll  
17 just take a very brief five-minute restroom  
18 break, and we'll come back for the next  
19 statement.

20 THE CLERK: All rise for the jury.

21 (The jury left the courtroom at  
22 10:10 a.m.)

23 THE CLERK: Please be seated.

24 (A recess was taken from 10:11 a.m. to  
25 10:20 a.m.)

1 THE CLERK: All rise.

2 (The judge entered the courtroom.)

3 THE CLERK: Please be seated.

4 (Brief pause.)

5 THE CLERK: All rise for the jury.

6 (The jury entered the courtroom at  
7 10:20 a.m.)

8 THE CLERK: Please be seated.

9 THE COURT: Defense make their closing  
10 argument.

11 MR. SCHROEDER: Thank you, your Honor.

12 (Brief pause.)

13 MR. SCHROEDER: Emerson, may I have  
14 control of the exhibits?

15 Thank you.

16 CLOSING ARGUMENTS ON BEHALF OF DEFENSE:

17 MR. SCHROEDER: Good morning. First I  
18 want to say a few words of thanks. Thank you  
19 for your attention this entire two weeks, two  
20 and a half weeks, and I'm sure it seems to you  
21 that it has been a very long time. And it has.

22 We've had 20 witnesses; 21, 20 witnesses,  
23 90 exhibits. On behalf of my client and on  
24 behalf of Laurie and Ray and Tris and Ed and  
25 Megan, we really appreciate your time and

1 attention to everything. You've been extremely  
2 attentive, and we really appreciate that.

3 So I only get one chance to talk. You  
4 may actually like that, I don't know, but it's  
5 one; one and done. Kind of like the NC double A  
6 tournament.

7 Members of the jury, you've heard a great  
8 deal over the course of this trial, most  
9 recently some very emotional testimony from a  
10 patient who took the stand and shared a deeply  
11 personal and painful experience. But her  
12 testimony, like the testimony of Dr. Ira  
13 Bernstein, related to topics that are not  
14 pertinent to the actual claims in this case.

15 You'll hear the jury instructions from  
16 Judge Doyle. I'm not going to go through all of  
17 the elements of each claim. You'll have a  
18 chance to match the facts in the case to the  
19 law.

20 But I want you to remember that that  
21 individual's testimony, as well as the testimony  
22 of Dr. Ira Bernstein, related to topics that are  
23 not related to this case.

24 This is an employment discrimination and  
25 retaliation case. It is not a medical

1 malpractice case. And while counsel for  
2 Dr. Porter had attempted to distract from the  
3 actual issues by presenting evidence that is  
4 designated to elicit sympathy and fear, this is  
5 quite frankly an emotional Hail Mary and a  
6 shameless attempt by Dr. Porter to leverage a  
7 patient's difficult fertility journey for her  
8 own financial gain.

9 What's more, Dr. Porter has flooded the  
10 record with evidence of how talented she is as a  
11 surgeon, despite the fact that Dartmouth Health  
12 has never asserted anything to the contrary. In  
13 fact, there were lots of testimony by Dr. Porter  
14 and her friends; Dr. Russell, Sharon Parent,  
15 Dr. MacCallum about how Dr. Porter was such a  
16 skilled surgeon.

17 I want to harken back to my opening  
18 statement. We didn't dispute it then. We don't  
19 dispute it now. She is a talented surgeon, but  
20 that is not the whole calculus for determining  
21 who is a great provider in a system where you  
22 have to work with people day in and day out.  
23 Different people and different titles, different  
24 positions and different departments.

25 Everyone must remember why we're here.



1 This is a case about employment decisions, about  
2 whether Dartmouth Health wrongfully terminated  
3 Dr. Porter, retaliated against her for  
4 whistleblowing, or discriminated against her  
5 because of her disability.

6 And while Dr. Porter has brought  
7 witnesses to the stand who have evoked emotion  
8 and stirred sympathy, the stories they've told  
9 don't provide any evidence to support her  
10 disability discrimination and retaliation  
11 claims. They are not connected to the legal  
12 questions before you.

13 Because at the end of the day you are  
14 going to be asked to marry the facts to the law.  
15 That is going to be your duty. And with care  
16 and respect, I suggest to you that some of the  
17 emotional testimony, however genuine, draws  
18 focus away from the core issues before you.

19 And on those issues it's our position  
20 that the plaintiff has failed, simply failed to  
21 present sufficient evidence to meet her burden  
22 of proof. And you'll hear about the burden of  
23 proof and the standard for that.

24 The plaintiff has the burden on all of  
25 her claims, we submit, based upon the record in

1           this case after two weeks of testimony,  
2           20 witnesses, 90 exhibits, that she fails to  
3           meet her burden of proof.

4           And let me just say a few words about the  
5           showing of exhibits that you saw before. I  
6           counted seven, I think. There are multiple  
7           iterations or multiple references to a number of  
8           exhibits. There are only seven references in  
9           the closing statement by Ms. Nunan. However,  
10          there are 90 exhibits in this case, and we want  
11          you to take a look at them. And look at the  
12          totality of the circumstances.

13          Now, one thing that Mr. Nunan didn't  
14          mention in her closing is really the ballgame  
15          here. It's credibility. It's credibility of  
16          the witnesses, and that is all within your  
17          domain. You get to determine the credibility of  
18          the witnesses. You've been with us for two  
19          weeks, over two weeks. During that time you've  
20          heard from a whole range of witnesses, and no  
21          doubt you've made assessments about whether you  
22          found them credible. Because credibility is  
23          everything in this case.

24          And I'd like to take some time now to  
25          review the testimony of a few key witnesses as

1 it relates to credibility.

2 Let me start with Dr. Porter. As you  
3 heard from both Dr. Porter's witnesses and  
4 Dartmouth Health witnesses, including  
5 Dr. DeMars, Dr. Porter is a very smart, very  
6 talented, has the potential to -- potential to  
7 be a great provider.

8 However, you also heard from both  
9 Dartmouth Health's witnesses and Dr. Porter's  
10 witnesses she is not a team player and is not  
11 someone who could be relied on to put her needs  
12 over the group or the team. Not surprisingly,  
13 she might have a fairly large ego and can be  
14 thin-skinned, manipulative, and demanding.  
15 These characteristics work against an effective  
16 team. As a result, Dr. Porter simply could not  
17 be the leader of the REI division.

18 Indeed, Richard Reindollar, the former  
19 chair of the OB/GYN division, who then became  
20 the chair of the ASRN, indeed told Leslie DeMars  
21 in no uncertain terms that making Dr. Porter the  
22 director of the REI division would be a mistake.

23 This is way before Dr. Hsu and Dr. Seifer  
24 got there. And you may recall we went through  
25 the chronology of events in very good detail,

1 and we did that because the timing of events and  
2 the chronology of events is important for you to  
3 understand.

4 Dr. Reindollar made his assessment long  
5 before Dr. Porter developed her brain injury and  
6 long before she made complaints about Dr. Hsu  
7 and Seifer. Her personality characteristics and  
8 not her disability led her superiors at  
9 Dartmouth Health to consistently judge her  
10 incapable of carrying the responsibility of  
11 moving the REI division forward in a leadership  
12 role. That was back in 2012, 2013.

13 Indeed, after testifying on direct  
14 examination pursuant to a carefully drafted  
15 script, we saw an indication of Dr. Porter's  
16 true personality on cross-examination. To say  
17 she was combative would probably be an  
18 understatement.

19 This was even the case when I even asked  
20 Dr. Porter about noncontroversial topics. She  
21 said, quote, I would not characterize it that  
22 way, end quote, 36 times. I thought it was  
23 more, but we checked the record.

24 After viewing that testimony, I hope you  
25 asked yourselves just a few simple questions.

1 Would you want to work with this person? Do you  
2 think this person is a team player? Do you  
3 think there is any setting in which Dr. Porter  
4 would view her colleagues as being competent?

5 I recall that Dr. Porter's own witness,  
6 Dr. Ira Bernstein, testified that Dr. Porter was  
7 continuing to complain and criticize her  
8 colleagues even now that she's at an entirely  
9 new hospital. And at the end of the day this  
10 case comes down to credibility, and Dr. Porter  
11 simply is not credible.

12 And, remember, you say a number of  
13 exhibits, and they were shown to you multiple  
14 times in Ms. Nunan's closing statement. Why?  
15 Because that's all they had is a handful of  
16 exhibits. You've got to look at all the  
17 testimony, all of the exhibits in the case and  
18 make your determination on credibility.

19 What about Leslie DeMars, who's chair of  
20 the OB/GYN department? Dr. Porter denied that  
21 she was ever friends with Dr. DeMars and refused  
22 to even acknowledge that they were anything  
23 beyond collegial co-workers, but the evidence  
24 revealed the following. They texted regularly.  
25 Their children played together. Their boys did

1 Boy Scouts. They bought the same fancy luxury  
2 cars. Dr. Porter went above and beyond to help  
3 Dr. DeMars get pregnant with her second son.  
4 That was a personal fact that Dr. DeMars was  
5 willing to share with you.

6 And on top of all that, they shared --  
7 they went away every single year for 10 to  
8 15 years and shared a hotel room. You know, who  
9 does that if they're not really close friends?  
10 By the way, I wouldn't do that with my close  
11 friends. I'm not sure about you.

12 As Dr. DeMars testified, Dr. Porter was  
13 the kind of friend she would have called at  
14 4:00 a.m. in the event of an emergency.

15 When I asked her about Dr. Seifer and  
16 Dr. Hsu, she testified she had no personal  
17 issues with Albert Hsu or David Seifer. More  
18 specifically, she stated the following. Once  
19 again, this comes down to what was the witness  
20 testimony and what were the documents that were  
21 put in front of you.

22 What did she say? I wasn't aware of any  
23 infighting in REI at all. There were no  
24 personal issues in terms of infighting. I would  
25 not characterize it as conflict. I got along

1 with them, yes.

2 And you may recall she said, My  
3 complaints about Dr. Hsu brought me no joy. She  
4 said that multiple times, and I just want you to  
5 remember what was said and testified to in  
6 determining the credibility of the witnesses.

7 But Dr. Porter could not deny the text  
8 messages where she told her now UVM colleague,  
9 Lisa McGee, that she hoped Albert Hsu would fail  
10 his Boards. She said Dr. Seifer was insane and  
11 Albert Hsu was pompous and not as bright as he  
12 thinks he is. Hearing him pontificate about his  
13 research would be torture.

14 Dr. Porter testified that she was  
15 completely taken aback by the closure of the REI  
16 division. Remember when I asked her that?  
17 Really?

18 Exhibit C-6-A is an excerpt of  
19 Misty Porter's text messages. Dr. Porter was  
20 trading text messages with Lisa McGee at UVM  
21 about a potential position at UVM Medical Center  
22 on April 13th. We went through all of the  
23 chronology of this case because chronology of  
24 events matters, and when things happened  
25 matters.

1           On April 13th, almost three weeks before  
2           she was notified that the REI division was being  
3           closed, Lisa McGee says to her, Do what you need  
4           to do but leave some time to come talk with us  
5           before you make any solid plans.

6           And then one day after the REI division  
7           closure, on May 5th, 2017; so the REI division  
8           closure is announced May 4th, then you have  
9           May 5th. Lisa McGee texted Misty to say the  
10          following: Hi, Misty. I spoke with Ira. We  
11          all know who Ira is at this point.

12          I spoke with Ira this morning, and he  
13          agreed. If you wanted, we could do a per diem  
14          arrangement pretty quickly for June. This could  
15          give you some breathing room to have time to  
16          think things through and make longer-term  
17          decisions. You could start later, too. No  
18          strings attached for longer term so you could  
19          still take the Boston option if it suites your  
20          needs better. We are here for you.

21          Dr. Porter couldn't remember exactly what  
22          the Boston option was.

23          What about Dr. Merrens? Obviously I told  
24          you upfront that Dr. Merrens was going to be  
25          here for the entire of the trial with all of



1           you, and I submit on the opposite end of the  
2           credibility spectrum is where Dr. Merrens sits.  
3           He testified on two different dates. He was  
4           consistent. He was articulate. He was frankly  
5           believable. And make no mistake about it,  
6           Dr. Merrens made the decision to close the REI  
7           division and terminate Dr. Porter's employment.

8           Now, why is that important? Because at  
9           the time that he made the decision he had no  
10          knowledge of either the specific nature of  
11          Dr. Porter's disability or the complaints she  
12          raised about Dr. Hsu and Dr. Seifer.

13          In fact, there's no evidence in the  
14          record to the contrary, and that's what this  
15          case comes down to; the evidence in the record.

16          You've been presented with a whole lot of  
17          information in this case, but I'll represent to  
18          you that this information is the most critical  
19          of everything that you have heard. How could  
20          Dr. Merrens possibly have discriminated or  
21          retaliated against Dr. Porter if he didn't have  
22          any specific knowledge of it in the first place?

23          And remember, the REI division, the REI  
24          division was closed. First time they've ever  
25          closed a division in the entirety of Dartmouth

1 Health's history, as far as anybody can testify  
2 to. There was no -- there was no dispute about  
3 that. And three positions were fired all at the  
4 same time. They were let go.

5 Now, how you judge Dr. Merrens'  
6 intentions? And Ms. Nunan glossed over these  
7 exhibits, but I would ask that you please review  
8 them when you're back in the deliberation room.

9 Exhibits B, C and D. Easy to remember.  
10 When Misty -- Misty Porter was involved in a  
11 dispute with a former chair of the OB/GYN  
12 department, Richard Reindollar, back in 2012 and  
13 2013, she thought that Dr. Merrens was helpful,  
14 respectful, a good sounding board to address her  
15 conflicts with Dr. Reindollar. Her e-mail  
16 responses demonstrate that he was a caring,  
17 thoughtful, and solid leader then and as well as  
18 further on down the line, three and a half years  
19 later. He helped her back then.

20 She never approached him again after  
21 that. They didn't stay in contact over the next  
22 three and a half years, but she certainly knew  
23 that she could go to him as a neutral sounding  
24 board.

25 Let me review a few of the key events

1 here. We went -- there was a lot of testimony  
2 on a number of these key issues, and this goes  
3 to the heart of the case. Dr. Porter cannot  
4 overcome several undisputed facts, which are  
5 fatal to her claims of whistleblower retaliation  
6 and disability discrimination.

7 Remember, the REI division closed,  
8 permanently closed in May of 2017. That was  
9 eight years ago. Almost eight years ago.

10 Dartmouth Health announced the closure of  
11 its REI division in early May, 2017. Multiple  
12 people testified this was the first time that it  
13 had ever happened. There's no -- there's no  
14 dispute about that.

15 Well, Dr. Porter apparently believes that  
16 this first-of-its-kind closure, which involves  
17 the termination of multiple positions, not just  
18 herself, came after a series of formal and  
19 informal attempts to fix the REI division.

20 What you heard from Ms. Nunan is their  
21 case. Well, this was a big reach. This was a  
22 big conspiracy. Really what they were trying to  
23 do was terminate Dr. Porter, and so they  
24 concocted this big scheme of shutting down a  
25 division, which they had never done before, in

1 order to get rid of Dr. Porter.

2 And what you heard was -- from  
3 Dr. Merrens was this was a tough business  
4 decision made by Dartmouth Health's chief  
5 clinical officer. That's part of his job  
6 responsibilities in running a healthcare system.  
7 This was not an overnight decision, and it  
8 impacted a number of people internally and  
9 externally as well. He understood the gravity  
10 of the decision, and he made these decisions  
11 even though they're unpopular.

12 To suggest that all of this was done just  
13 to target Dr. Porter is another example of her  
14 ego getting in the way. This was not about her.  
15 Three physicians were terminated; Dr. Seifer,  
16 the division director, Dr. Misty Porter,  
17 Dr. Albert Hsu. All three positions were  
18 terminated one month after notice of its  
19 closure. Each of them was offered a severance  
20 package.

21 When Dr. Porter asked her for severance  
22 they gave it to her. Nine months of her base  
23 salary; \$228,000.

24 If we could bring up C-13.

25 You may recall the testimony about this

1 time of events, this sequence of events. There  
2 was the May 25th letter from Dr. Porter to a  
3 series of individuals. She said, Well, I never  
4 talked to anybody from Dartmouth Health. I  
5 never reached out to them. I never heard from  
6 them.

7 Well, when you see this letter there's a  
8 couple of really important things in it.

9 Number one, Dr. -- Ms. Giglio, her name  
10 is now Claiborne, Amy Claiborne says, This  
11 letter serves as a response to your letter dated  
12 May 25th, 2015, and questions posed during our  
13 meeting together with your husband on Friday,  
14 May 26th.

15 She also says to her she'd like to thank  
16 her for her accomplishments and also let's her  
17 know that, I reviewed your request with clinical  
18 and operational leadership, and this related to  
19 wanting to reconsider her employment termination  
20 date. And she's informed that, no, they can't  
21 do that.

22 But then she says, In addition -- and  
23 this is in the fourth full paragraph -- in our  
24 meeting you had requested an increase in the  
25 severance amount. After considering this

1 request, D-H is willing to extend severance to  
2 36 weeks of severance. That was offered to her.  
3 That shows Dartmouth Health's intent.

4 Actually the amount of money, or I should  
5 say the number of months was certainly more than  
6 the other two positions received.

7 And remember, again, Dartmouth Health  
8 hasn't reopened this division, nor does it have  
9 any current plans to do so. The closure is now  
10 almost eight years ago. So any speculation that  
11 this closure was like a short-term fix to get  
12 rid of Dr. Porter and then, well, we can go back  
13 and open the REI division, that still hasn't  
14 happened eight years later. So I'd submit that  
15 that theory, that conspiracy theory has gone out  
16 the window.

17 Now, it's clear that Dr. Porter disagreed  
18 with the decision to close the REI division. No  
19 doubt about that, and a lot of other people  
20 disagreed with it. But this was a business  
21 decision that was made by Dartmouth Health and  
22 specifically a business decision made by the  
23 chief clinical officer, Dr. Ed Merrens.

24 You'll hear the judge explain the  
25 business judgment rule during his charge to you.

1           You may not agree with the decision. It may not  
2           be popular. It may not be something that you  
3           want to happen or others wanted to happen or the  
4           media said shouldn't have happened, but  
5           Dartmouth Health had the responsibility and  
6           certainly within their province to decide  
7           whether or not it made sense to keep the REI  
8           division open any longer.

9           And just because a business decision may  
10          be unpopular and result in difficult decisions  
11          that impact the employment of the individuals  
12          does not make it discriminatory or retaliatory.

13          Remember what this case is about. It's a  
14          disability discrimination and whistleblower  
15          retaliation case. And you may have thought at  
16          some point when you were listening to the  
17          evidence, like what are we listening to?  
18          Because there were a number of witnesses where  
19          it was really unclear to me whether or not we  
20          were actually talking about an employment  
21          discrimination and retaliation case.

22          Upfront I gave you a little bit of a  
23          preview of the evidence to say, well, here's  
24          what happened. I suspect at this point you can  
25          see how we got here.

1 Now, through a series of e-mails that  
2 were sent, shown to you a couple of times in the  
3 closing, the same e-mails, plaintiff attempts to  
4 cast doubt on the legitimate basis for the REI  
5 division closure, and I submit that they fall  
6 flat.

7 Let's go over the issue of the REI  
8 division closure itself and the reasons for it.  
9 There's been a lot of testimony about the  
10 reasons for the REI division closure.

11 Plaintiff's counsel tried to demonstrate  
12 that Dr. Merrens or others like Dr. Conroy were  
13 not credible because they did not articulate  
14 each and every reason for the closure when they  
15 spoke to the employees or the media.

16 You heard from Dr. Conroy. She had a  
17 five-minute conversation with Dr. Merrens. This  
18 happened before she even got there as the CEO,  
19 and that goes to the heart, the credibility of  
20 this case and the lack of evidence to support  
21 the claims. She didn't have anything to add in  
22 that regard.

23 Ms. Nunan brought up declining  
24 birthrates, declining birthrates. She talked  
25 about the lack of providers in that interview.



1 She didn't know anything about the REI division  
2 closure other than what Dr. Merrens told her.

3 Plaintiff's counsel also wondered why  
4 their public comments made no mention of  
5 infighting among the physicians, dysfunction in  
6 the REI division, interpersonal conflicts. Why  
7 didn't we say that to the public and to the  
8 media?

9 Does that really -- just step back and  
10 listen to that line of reasoning. Does that  
11 really make sense to you?

12 Would you have really expected  
13 Dr. Merrens to put a spotlight on all of the  
14 underlying reasons for the closure when he spoke  
15 to employees outside of the REI division? Or  
16 when he spoke to the media?

17 His messaging to staff was meant to  
18 provide some details, not all the reasons why.  
19 It was high level. It would have been  
20 unprofessional and, quite frankly, caused even  
21 more reputational harm if he went into detail  
22 about the fact that all three of these  
23 physicians couldn't get along in the sandbox  
24 together. They couldn't get along and  
25 collaborate and engage in teamwork.

1                   And, by the way, this isn't just  
2                   Dr. Porter. It's all three of them, right? I  
3                   referred to the land of misfit toys upfront  
4                   because that's just what I think of when I think  
5                   of this group of individuals who all bear  
6                   responsibility for the dysfunction in the REI  
7                   division. It's not one person. We're not in  
8                   any way saying, well, this is all Dr. Porter.  
9                   No. All three of them share some level of  
10                  responsibility and culpability for why the REI  
11                  division wasn't working.

12                 And, to be sure, e-mails don't tell the  
13                 full story, especially ones that are -- that are  
14                 sent postmortem after the fact of the closure  
15                 had happened.

16                 And Dr. Merrens testified. He was asked  
17                 pointblank. I was embarrassed. I was  
18                 embarrassed that this happened; that this  
19                 division couldn't get its act together for a  
20                 variety of different reasons, but the  
21                 dysfunction was the root cause for the real  
22                 problem, which was an inability to recruit and  
23                 retain highly specialized nurses.

24                 As he testified, they were inextricably  
25                 linked. And I think Ms. Nunan asked you about

1 Exhibit 60, if we can pull that up.

2 Thanks, Ray.

3 As Ms. Nunan noted, it's ultimately the  
4 dysfunction of the physicians who worked in this  
5 area for years, as well as recent hires, and  
6 ultimately a failure of leadership, for which I  
7 hold Leslie fully accountable.

8 Certainly Dr. DeMars has some culpability  
9 here for her failure of leadership. No doubt.  
10 No doubt. And part of the problem is having two  
11 friends where one is now the supervisor of the  
12 chair of the OB/GYN department. That made it  
13 awkward. A natural awkwardness is probably an  
14 understatement. And because of the fact that  
15 there was this dysfunction, they did not have  
16 sufficient nursing assistance.

17 Ms. Nunan was trying to call into  
18 question Dr. Merrens and, well, why didn't he  
19 share something with the public and why didn't  
20 we say something to the public or to the media?  
21 He was under no duty to do that. And the fact  
22 that he didn't do that doesn't call into  
23 question the legitimacy of his decision-making  
24 or, for that matter, raise a question of his  
25 overall credibility.

1           The same holds true in terms of where  
2           Dr. Porter's counsel tried to call into question  
3           the basis for Dr. Porter's termination.  
4           Dr. Merrens was crystal clear on this point.  
5           The REI division closure resulted in the  
6           termination of all three positions, no question,  
7           including Dr. Porter.

8           And plaintiff's counsel had one witness  
9           who testified that in a big audience of members  
10          of the OB/GYN department, she asked about  
11          Misty's termination. Dr. Merrens said she was,  
12          quote, on disability, end quote. Now, does that  
13          really make sense?

14          Now, that's Dr. Russell who said, well, I  
15          then saw her fairly shortly thereafter, and I  
16          think I referred to it as the raspberry patch.  
17          She never makes any mention of this alleged  
18          comment by Dr. Merrens.

19          And Dr. Merrens could not be any more  
20          clear. He never discussed anyone's status and  
21          certainly nothing specific about Dr. Porter.  
22          He's the chief clinical officer of a hospital  
23          and had been for a number of years. He wasn't a  
24          rookie at this. He understood how to make  
25          presentations to staff and what he would and

1 would not say. And he was clear; he never said  
2 that.

3 And, in fact, Dr. Porter's suggestion  
4 that this experienced, high-level executive  
5 would go before a room of 30 or 40 people and  
6 announce that Dr. Porter had been terminated  
7 because of her disability is just plain  
8 illogical. It doesn't -- it doesn't make sense.

9 And, in fact, while you had one person  
10 say that with respect to -- on behalf of  
11 Dr. Porter, you had Kelly Mousley, who doesn't  
12 work for Dartmouth Health. And by the way, I  
13 think six out of ten Dartmouth Health's  
14 witnesses don't work for Dartmouth Health  
15 anymore, one of whom, Ms. Gunnell, had been laid  
16 off.

17 So when you look at credibility, I really  
18 want you to look at the credibility of the  
19 witnesses. I mean, she certainly didn't want to  
20 be here. She got laid off a couple years ago.  
21 Does anybody really think they want to be  
22 testifying in a court case if they had been laid  
23 off by that same employer? But she was  
24 credible. She was believable.

25 Let's go back to that issue of the big

1 OB/GYN department meeting. Katie Mansfield who  
2 attended the meeting, Ms. Nunan said, well, they  
3 didn't recall it. What did Katie Mansfield  
4 actually say? She testified that Dr. Merrens  
5 did not say that, and she would have recalled  
6 something like that. Quote, And she would have  
7 recalled something like that, end quote.

8 Kelly Mousley, another former Dartmouth  
9 Health manager, testified in no uncertain terms  
10 that Dr. Merrens said nothing about Misty  
11 Porter's condition or anything about her  
12 personally. In her words, quote, I feel like  
13 that's something I would remember. Yeah, that's  
14 big, end quote. That was her testimony. This  
15 just didn't happen.

16 Let me give you a few comments just about  
17 the state of the REI division because  
18 plaintiff's entire case rests on this conspiracy  
19 theory. They concocted this idea that we're  
20 just going to get rid of a division, get rid of  
21 all three positions. Ms. Nunan said, yep, the  
22 baby out with the bath water. All because of  
23 Dr. Porter. The evidence doesn't support it.  
24 The facts don't support it. The testimony  
25 doesn't support it.

1           Let's go back to what the REI division  
2           was and was not. It's undisputed that this was  
3           a small rural program. It didn't have a high  
4           volume of patients. It had a good amount of  
5           turnover of physicians and nurses between 2005  
6           and 2015. And as I predicted in the opening  
7           statement, current and former Dartmouth Health  
8           employees testified that the REI division was a  
9           tough environment to work in. And REI's  
10          reputation far and away preceded it.

11          I think we all know, and have in our own  
12          respective businesses where we may work,  
13          examples of, well, that department is pretty  
14          tough. I don't want to really deal with them.  
15          That's exactly what the case was with the REI  
16          division.

17          In the early years of the REI division  
18          there were two factions. There was the Misty  
19          Porter team. There was Sharon Parent, her  
20          nurse, and then the other team.

21          And later on it became three different  
22          camps and three different silos, right? And it  
23          was clear and certainly clear from the evidence  
24          that Dr. Hsu and Dr. Seifer didn't help to  
25          bridge the gap in teamwork and collaboration

1 along with Dr. Porter.

2 You may recall that Sharon Parent was the  
3 first witness to testify in support of  
4 Dr. Porter. You might also recall that  
5 Ms. Parent's testimony about the recruitment of  
6 nurses to the REI division was proven to be  
7 totally false. She testified -- this is  
8 Ms. Parent. She was the first witness, which I  
9 realize, I'm not sure if it was true for all of  
10 you, that seems like that was months ago. She  
11 testified no one ever asked her for ideas on how  
12 to recite nurses, and Dartmouth Health never  
13 posted the position externally.

14 But then she was presented by  
15 Ms. McDonald with evidence of the contrary;  
16 that, in fact, there was an e-mail showing that  
17 they had been looking for ways, Dr. Seifer had  
18 been looking for ways to recruit nurses to the  
19 REI division. And this predated the  
20 November/December time period. There's postings  
21 that were sent out in June of 2016.

22 In fact, I'd ask you to look at  
23 Exhibit V, if you'd bring that up, Ray.

24 This was the posting that went out in  
25 June of 2016. They had been looking for REI



1 division nurses for a really long time. And  
2 Ms. Parent said, Well, it should take you about  
3 six months to find somebody. They didn't. They  
4 couldn't find anybody. That's the reality.

5 Now, in terms of the atmosphere within  
6 the REI division, the environment, they had a  
7 number of people come up before you. Again,  
8 Dr. Judy Stern, the retired director of  
9 embryology, and I think you all agree she was an  
10 honest broker, unvarnished and heartfelt, and  
11 right out of the gate without any prompting said  
12 Dr. Porter is not a team player. She worked  
13 with her for 10 to 15 years.

14 A couple of times I'm not sure who was  
15 asking the questions, me or Dr. Stern, because  
16 she wanted to explain the environment that  
17 they -- everybody was operating in. She  
18 testified she worked with Misty Porter for many  
19 years, and her comments were credible.

20 She stated, quote, I just wanted to say  
21 that Dr. Porter had criticisms of all the  
22 physicians in the division, end quote. And that  
23 that was her experience throughout the time she  
24 was there.

25 She said that Dr. Porter had a lot of

1 criticisms about the nursing staff, often about  
2 some of her lab staff, and they didn't do things  
3 the way she thought they should be done. And,  
4 yes, she gave one example about an internal form  
5 that the chair of the department wanted to use.  
6 And that may seem like meaningless to some  
7 people, but it's just par for the course on how  
8 the dynamic in this group was. It was  
9 untenable. There was a lot of tension. And  
10 that happened before Dr. Hsu came on the team,  
11 it was before Dr. Seifer came on the team, and  
12 before Dr. Porter had her disability or her  
13 condition, her medical condition.

14 What about Kelly Mousley? Another former  
15 D-H employee who was asked to testify. She was  
16 direct. She was forthright. She was clear.  
17 The nurses didn't get along. She talked about  
18 the fact that she supervised the administrative  
19 staff across all six OB/GYN divisions and  
20 testified about the REI division. There were  
21 periods of time, in her words that, quote, I  
22 felt like it was my full-time job, end quote.

23 You also heard that from Ms. Gunnell,  
24 right? Corroboration of testimony.  
25 Corroboration of the fact that to the extent

1 that there were individuals that had  
2 responsibility for the REI division as well as  
3 other divisions within the OB/GYN department,  
4 they spent the lion's share of their time on  
5 dealing with conflict, disagreements, disputes  
6 in the REI division.

7 I asked Kelly Mousley if she experienced  
8 this level of struggle or lack of  
9 professionalism in other divisions. No. Quote,  
10 no, nothing like this. It was an outlier, end  
11 quote.

12 People warned Ms. Mousley of Dr. Porter.  
13 She said, quote, People telling me that if I met  
14 with Dr. Porter to stand my ground and not allow  
15 her to intimidate or bully me, to do what's  
16 right. Quote, Try to warn me to be prepared and  
17 to be strong.

18 Now, remember, she doesn't work for  
19 Dartmouth Health. She came in to testify about  
20 her experiences in that division. There was no  
21 coordination between teams on how to handle  
22 incoming patient calls. And you heard a lot  
23 about that, this territorialness. Well, if a  
24 patient came in and it wasn't for that  
25 particular provider, it didn't get over to the

1 other provider. I mean, hopefully the evidence  
2 as you saw it demonstrated that this group had  
3 no teamwork, no collaboration whatsoever. There  
4 was lots of dissension.

5 And then other than her few supporters,  
6 her team, if you will, Dr. Porter was critical  
7 of a slew of physicians and nurses, many of them  
8 junior and less experienced. You heard the  
9 testimony about the fact that Dr. Porter  
10 criticized some of the other former physicians;  
11 a woman by the name of Sophia as well as her  
12 husband, Neil. You saw many, many e-mail  
13 communications from Dr. Porter herself where she  
14 is, at a minimum, critical and, at worse,  
15 downright mean-spirited.

16 Now, let me just turn to the two  
17 physicians who were subjected to, if you will,  
18 character assassinations throughout this trial.  
19 I told you that Dr. Porter didn't call them as  
20 witnesses, and I think that's telling.

21 With respect to Albert Hsu, where do we  
22 begin with him? Dr. Porter had a negative view  
23 of Dr. Hsu before he even got there.

24 Dr. Porter, whether she was his formal mentor or  
25 not, seemed to give up on Dr. Hsu after his

1 first six months. She testified, the first six  
2 months I was there for call, et cetera, and then  
3 let him go on his own to be independent and  
4 then, well, he didn't do things according to the  
5 way that she thought they should be done.

6 What should she have done? She's there  
7 as the more senior person in the division. So  
8 even though she had been out for six months on  
9 her leave of absence, December of '15 through  
10 June of '16, in June she writes this long letter  
11 basically gaslighting Dr. Hsu for all the  
12 shortfalls of his practice; clinical skills,  
13 competency, et cetera.

14 And when David Seifer came on the scene  
15 right in that same time period, he gets this  
16 long list of basically trashing Dr. Hsu.

17 Now, Dr. Seifer got the job that  
18 Dr. Porter always coveted but was never  
19 considered for, and there had to be just a tinge  
20 of jealousy masked by some of her numerous  
21 critical comments.

22 She immediately found everything wrong  
23 with his clinical knowledge, his skills, his  
24 technique. Of course, Dr. Seifer joined a small  
25 REI program where the lines had been drawn well

1 before he got there. No one was as great as  
2 Dr. Porter in her mind. Dr. Seifer's brief  
3 11-month tenure was probably doomed from the  
4 start.

5 Now, Dr. Seifer had his own problems with  
6 proper social graces and communication skills,  
7 I'm not minimizing those issues, but needless to  
8 say the lack of collaboration and teamwork  
9 created a negative environment which really  
10 expedited the eventual demise and closure of the  
11 REI division just a few months into 2017.

12 And what about the REI division? What  
13 about the reasons why they closed it? Now,  
14 there's not just one reason, and that's  
15 understandable, right? You're -- there's not  
16 one reason why something happens that's a really  
17 complex critical decision that's going to affect  
18 a number of people.

19 The final six months Dr. Porter calls  
20 into question, well, there wasn't really a  
21 nursing shortage. There wasn't really a  
22 problem. There are ways to fix the nursing  
23 shortage. They should have been able to do it,  
24 but time and again the testimony across the  
25 board was consistent and it was corroborated by

1 multiple e-mail communications and documents.

2 And despite claiming it was somehow  
3 artificially manufactured, even Dr. Porter had  
4 to reluctantly acknowledge it. Remember, by  
5 late 2016 the REI division was down two people.  
6 Casey Dodge had been terminated or resigned.  
7 Sharon Parent retired in December of 2016.

8 And Dr. Porter's counsel repeatedly  
9 suggested that had Sharon Parent been allowed to  
10 return from retirement, the nursing shortage  
11 would have been solved. You saw documents and  
12 heard evidence establishing that that simply was  
13 not true. The REI division was looking for  
14 additional nursing support at that time above  
15 and beyond Ms. Parent, and when she did retire  
16 the shortage only became more dire.

17 And Heather Gunnell testified; remember  
18 she was the individual who had been laid off by  
19 Dartmouth Health. She was asked whether Sharon  
20 could have solved the nursing crisis, and her  
21 testimony was clear. Absolutely not. That was  
22 not -- that was a small Band-Aid on a major,  
23 major problem. And by April of 2017 it's  
24 undisputed that they were left to one  
25 less-than-fully-trained REI nurse.

1 Exhibit J, if we could pull that up, that  
2 was an exchange between Dr. Porter and Karen  
3 George. You heard testimony from Karen George.  
4 They both acknowledged that they -- quote,  
5 Nursing situation on all fronts is a nightmare.  
6 Nursing needs to change.

7 Now, you then saw, if we can bring up  
8 A-16, and I'll run through this fairly quickly  
9 because the evidence of this was overwhelming.  
10 December 6th there's a message from Dr. DeMars  
11 and Dr. Seifer about the imminent REI nursing  
12 crunch and requiring significant changes in  
13 nursing workflow and task allocation. And that  
14 they had to focus their efforts on providing  
15 excellent patient care for those who already had  
16 a tentative start date, and they were pushing  
17 off the start dates for other people. This is  
18 December, right? Early December. Mid-December.

19 A-20, if we could.

20 December 16th. This is the e-mail from  
21 Dr. Seifer, just ten days later. During the  
22 months of January and February we will not see  
23 any new patients, and we will be limiting our  
24 patient appointments to only those necessary for  
25 the patients currently in cycle who will need



1 retrievals or transfers from January or  
2 February.

3 Once again, Dr. Porter's whole case rests  
4 on this was a conspiracy to get her out. They  
5 created this entire rouse. So all of these  
6 documents, the 90 documents you saw, were all a  
7 rouse and conspiracy to get Dr. Porter out of  
8 Dartmouth Health.

9 But then you have not just those events  
10 where they're really slowing down or pausing new  
11 patient referrals, right? Because they don't  
12 have capacity to handle it. You then have the  
13 January/February, 2017 Value Institute. And in  
14 that there are a couple things that happened.  
15 There's a couple of meetings in December, or I  
16 should say the fall of 2016 and then January and  
17 February of 2017, and they have a couple of  
18 retreat dates.

19 And Dr. DeMars testified that the  
20 evaluation by the Value Institute was twofold.  
21 One was that the division was unsalvageable.  
22 And, two, that if she was going to keep  
23 Dr. Porter on in the department that she had to  
24 do two things. First was to very clearly  
25 confront her that she was central to the

1 dysfunction and that, if she were to continue,  
2 that it could not be in a leadership role.

3 And Dr. DeMars testified, quote, I  
4 remember looking at the person who talked to me  
5 about this and saying, This would have been the  
6 hardest thing I would ever have to do, end  
7 quote.

8 Heather Gunnell and Daniel Herrick both  
9 testified that this was not salvageable; that  
10 this -- that the report out of the Value  
11 Institute was that we couldn't do anything about  
12 it. It was not -- we couldn't fix it at the end  
13 of the day.

14 Go to B-2 for a second. Then you have  
15 Dr. Porter's comments about the program itself,  
16 and those comments are particularly telling.  
17 She said, Indeed, the program is close to  
18 dissolution.

19 Further on down she says, There's not  
20 enough IVF at DHMC, nor has there ever been,  
21 despite heavy efforts at marketing and outreach  
22 for many providers within REI to focus only on  
23 IVF. Again, these are her words.

24 And by April the writing was on the wall,  
25 if we could bring up B-7.

1           This is April 27. This is the e-mail  
2           from Ms. Gunnell to Dr. Porter regarding patient  
3           scheduling. Actually it's to everybody, and it  
4           was sent on behalf of Dr. DeMars. We have a  
5           critical staffing issue in REI, and once again  
6           they're deferring new infertility evaluations.  
7           They're not scheduling any patients for an ART  
8           cycle. And the remaining patients, May through  
9           July, are currently under review. Updates will  
10          be forthcoming.

11           And this was just the final straw.  
12          Because by that date Marlene Grossman, who was  
13          the one REI, full-time REI nurse in Bedford;  
14          Bedford/Manchester, New Hampshire, she resigned,  
15          and so now you're left with one  
16          less-than-fully-trained nurse.

17           I want to turn your attention to the  
18          claims in this case, right? I said upfront the  
19          claims in this case are employee discrimination  
20          and retaliation.

21           Based upon the evidence in the record  
22          Dr. Merrens was the ultimate decisionmaker on  
23          the REI closure. He didn't know anything about  
24          Dr. Porter's medical status or condition at that  
25          point. He didn't know anything about any

1 complaints she made about Dr. Hsu or Dr. Seifer.  
2 And so when you're looking at the analysis, the  
3 legal analysis that you're being asked to  
4 perform, remember those facts. Because that's  
5 factually what the record reveals.

6 And despite trying to rattle him by  
7 calling them in their case, Dr. Merrens was  
8 emphatic. I received recommendations from  
9 Daniel Herrick -- who by the way is no longer  
10 employed by Dartmouth Health -- to close the REI  
11 division.

12 Leslie DeMars, while plaintiff's counsel  
13 also called her in their case-in-chief, which  
14 they have a right to do. They tried to  
15 challenge her on various points on  
16 cross-examination right out of the gate. She  
17 was unflappable. She told you what happened and  
18 where she was in the recommendation process.

19 She recommended the closure of IVF but  
20 not the REI division. She was clear about that.  
21 And she also said that she disagreed with the  
22 decision to close the division. Quote, I  
23 disagree with it. I was unable to argue my  
24 disagreement, and I was unable to turn back the  
25 fact that the actions had been taken, the

1 termination actions had been taken and it had  
2 been publicized, end quote.

3 Quote, I was not allowed to present that  
4 plan before the decision was made to terminate  
5 the division, end quote.

6 And with regard to Dr. Porter, Dr. DeMars  
7 testified, I absolutely wanted her to stay on.  
8 I had a job for her that I was trying to plan  
9 for. You saw that Exhibit 50-A, if we could  
10 pull that up for a second.

11 Because this gets down to your analysis  
12 of what was available for her, what position  
13 could she potentially go to. And there was  
14 testimony by Heather Gunnell who testified that  
15 she and Daniel drafted this theoretical plan to  
16 retain Dr. Porter at the request of Dr. DeMars.

17 But the record is clear on a couple  
18 points. One, this document never went to  
19 Dr. Merrens, so he didn't consider it in his  
20 decision. And, two, Dr. Chertoff will  
21 testify -- testified, and remember she's the  
22 doctor that travelled from Portland, Oregon by  
23 planes, trains and automobiles to get here,  
24 albeit a day later. She testified that they  
25 already had gynecological ultrasound experts in

1 the radiology department.

2 And it would be -- when it became clear  
3 that Dr. Merrens was unwilling to keep the REI  
4 division open, Dr. DeMars called a colleague at  
5 UVM to get her a job. You saw those text  
6 messages asking her to help her friend. Yeah,  
7 you should call our friend. There's no unlawful  
8 animus here. There's no discriminatory motive  
9 at play here. Just a conflicted individual  
10 who's struggling to do right by her friend while  
11 also doing the right thing for the OB/GYN  
12 department.

13 But at the end of the day, at the end of  
14 the day she didn't make the decision. She just  
15 didn't make the decision. That was Dr. Merrens.

16 You saw him testify. He testified on two  
17 days, not one. And the evidence throughout this  
18 case sustained that Dr. DeMars's friendship with  
19 Misty was a complicated one and one that created  
20 numerous challenges for her leadership.

21 Dr. DeMars was fully aware of the issues  
22 Dr. Porter created within the REI division, and  
23 she kind of put up with it for a long period of  
24 time. And it even went so far as to approach  
25 human resources to ask him to prepare a

1 memorandum of expectation about Dr. Porter's  
2 behavior. You remember seeing that. She said,  
3 Well, it's the biggest mistake of my life. I  
4 really should have held her accountable, but she  
5 couldn't. She was her friend. She actually  
6 helped Dr. DeMars get pregnant with her second  
7 son. Like how conflicted can you be? Never  
8 mind a friendship and the fact that they shared  
9 rooms together. Dr. Porter helped Dr. DeMars  
10 get pregnant with her second son. That's  
11 undisputed.

12 And if anybody doesn't think that that  
13 created a level of conflict, awkwardness to deal  
14 with her friend and colleague who was difficult  
15 to deal with from a teamwork and collaboration  
16 standpoint, I don't know what is.

17 She didn't deliver the memo to Dr. Porter  
18 and testified that was her biggest mistake. And  
19 Dr. Merrens didn't rely on any recommendation by  
20 Dr. DeMars with respect to the REI closure. In  
21 fact, he testified he, quote, completely lost  
22 faith in her as a leader.

23 So you're being asked before, well, you  
24 know, Dr. DeMars harbored this animus towards  
25 Dr. Porter and that should be imputed to

1 Dr. Merrens and, therefore, Dartmouth Health  
2 should be held responsible. How can that be?  
3 Dr. Merrens was really clear.

4 At this point Dr. DeMars, her judgment  
5 and inability to actually run the OB/GYN  
6 department was clear. She couldn't do it. And  
7 he saw that, and he certainly wasn't listening  
8 to her. In fact, she testified, hey, I think we  
9 should shut down the IVF department but not the  
10 REI division. She was clear about that.

11 And he made the decision, I'm shutting  
12 down the entire thing. And he did that even  
13 though it was unpopular, but it needed to be  
14 done for a lot of reasons.

15 Now, what about the potential  
16 accommodations that Dr. Porter thinks she should  
17 have received at the time of the REI closure?  
18 I'm not going to go into all of the law here  
19 because you're going to hear that from Judge  
20 Doyle. But under the ADA, the Rehab Act, the  
21 disability discrimination laws, if somebody has  
22 a disability, you might have -- you've got a  
23 duty to reasonably accommodate them. And  
24 "reasonably accommodate" includes reassignment  
25 to a vacant position. That's what the law



1 states. Reassignment to a vacant position.  
2 Those words are really important for you to  
3 understand.

4 There are a number of other things that  
5 could be a reasonable accommodation, but here  
6 this is a big issue, right? You receive a  
7 charge from the Court that the ADA does not  
8 require creating a new position with somebody,  
9 even somebody with a disability.

10 Now, I don't want to -- even though there  
11 was not a significant amount of testimony on  
12 this topic, it goes to intent, motive,  
13 et cetera, I want you to remember what Dartmouth  
14 Health did to reasonably accommodate Dr. Porter  
15 from December 15 to the closure of the REI  
16 division in May of 2017. That's about  
17 18 months. She was on two leaves of absence for  
18 nine months total.

19 And when she was there it was a fairly  
20 sporadic, reduced schedule while she was on  
21 long-term disability, which started in June of  
22 2016.

23 If we can show Exhibit 129, Ray, I'd  
24 appreciate that.

25 This just highlights the laundry list of

1 accommodations that she sought and Dr. DeMars  
2 approved and authorized for her. Dr. Porter  
3 does not dispute that Dr. DeMars approved and  
4 authorized all of the requested accommodations  
5 in June of '16; allowed her to work from home,  
6 allowed her to have space at work by herself.  
7 She had essentially created her own schedule.  
8 You heard testimony about the fact that she  
9 didn't want anybody else knowing her schedule.

10 While she blames the termination of her  
11 emotional well-being over the summer of 2017,  
12 she acknowledged that after the REI division had  
13 been closed she had two separate visits to the  
14 Mayo Clinic for two-week periods. So two  
15 two-week periods; June/July, July/August. And  
16 then she had another surgery in September of  
17 2017 and was on another leave of abscess, albeit  
18 at UVM, from September to November of '17.

19 Now, I went back to the opening statement  
20 in this case, and Mr. Vitt referred to the fact  
21 that Dr. Porter did surgeries that no one could  
22 perform. He said it a couple times. What's the  
23 actual evidence in this case?

24 There was no vacant position in the  
25 radiology department. Leslie DeMars testified

1 that she went to the chair of the radiology  
2 department, at the time Joselyn Chertoff, to  
3 inquire about any potential vacancies for her  
4 friend, Misty Porter. And she went to the  
5 radiology department and asked her, and then you  
6 heard not just from Leslie DeMars, you heard it  
7 from Dr. Chertoff. And she testified in May of  
8 2017 there were no open positions in our  
9 radiology department. They already had a  
10 sufficient number of radiologists, and there's  
11 no evidence in the record to suggest otherwise.

12 Remember, it's the plaintiff's burden  
13 here. Plaintiff has to show that there was a  
14 vacant position available to be reassigned to.  
15 It was glossed over in Ms. Nunan's initial  
16 statement, but it's important for you to  
17 remember because that's the law.

18 If somebody has a disability and the  
19 employer has a reasonable duty to accommodate in  
20 this particular place, Dr. Porter is asserting  
21 that, well, I should have been reassigned. I  
22 should have been reassigned to OB/GYN. I should  
23 have been reassigned to radiology. I'll get to  
24 OB/GYN in a second.

25 Let's just stay with radiology for a

1 second because there's two different places that  
2 she could have ended up. Dr. Chertoff was clear  
3 and articulate that she, as well as many other  
4 physicians in the radiology department,  
5 interpreted gynecologic and early obstetric  
6 ultrasounds on a routine and regular basis. So  
7 Dr. Porter's skills were not unique, special, or  
8 missing after she left Dartmouth Health.

9 And the testimony by friends, many of  
10 Dr. Porter's friend that testified were all in  
11 other divisions or other subdivisions of  
12 Dartmouth Health. That doesn't change the fact  
13 that Dr. Porter was not a unicorn.

14 And to be sure, you heard Dr. Chertoff,  
15 right? She testified she's interpreted over  
16 10,000 gynecologic and early obstetric  
17 ultrasounds. That's undisputed. That's  
18 un rebutted testimony. There's nothing to  
19 contradict that.

20 But Dr. Chertoff was already clear that,  
21 you know, I wasn't the only one, but as the  
22 chair she certainly had that expertise. And  
23 they routinely handled gynecologic and early  
24 obstetric ultrasounds on a daily, weekly,  
25 monthly basis. They have six ultrasound rooms

1           there.

2                   Now, what about possible reassignment to  
3           the OB/GYN department? Dr. Porter testified  
4           that three weeks after the REI division closure  
5           she wrote a letter to Dr. Merrens, Dr. Padin and  
6           others. Exhibit B-12. That's the May 25, 2017  
7           letter, okay? This is a key document.

8                   There's a lot of important documents in  
9           this case, but I would submit that this is a key  
10          document. And it's interesting, out of the  
11          seven exhibits that we heard in the initial  
12          closing statements, this was not one of them.  
13          This is a key document for you to review because  
14          why?

15                  Dr. Porter send it three weeks after she  
16          received notification in person that the REI  
17          division was being shut down. She obviously  
18          took a long time to write the letter. It's  
19          important for what is in it and what is not in  
20          it. Please review it when you can.

21                  She doesn't mention anything about being  
22          treated differently by Dartmouth Health as a  
23          result of her condition or any complaints about  
24          anything; patient harm, patient safety, anything  
25          about Dr. Hsu or Seifer.

1           If anything, all she does is try to show,  
2           well, you know, compared to the other two  
3           doctors I'm much more superior, and you should  
4           keep me in some capacity.

5           Now, as you heard, she had the same legal  
6           counsel in this case, Mr. Vitt, as she did back  
7           in 2013, and she had every opportunity in this  
8           letter, three weeks after, to raise any issues  
9           in this letter on the claims that are now in her  
10          lawsuit. She didn't raise them in the letter,  
11          and she didn't raise them in her meeting with  
12          the head of human resources. Think about it.

13          We can go back to C-13 for a second, and  
14          then I'll come back. We'll go to the second  
15          page.

16          This is a letter where she meets with the  
17          head of HR, the head of HR for the entire  
18          Dartmouth Health system. This is in response to  
19          your letter dated May 25 and to the questions  
20          she posed during this meeting on May 26th,  
21          right?

22          Okay, now, go back to the B-12 for -- if  
23          you would.

24          In the document she says, quote, As a  
25          gynecologic surgeon I perform complex

1 hysteroscopic -- this is definitely  
2 challenging -- laparoscopic and robotic  
3 procedures not offered by many, if not most of  
4 the other gynecologists, end quote. That was  
5 Dr. Porter's words.

6 Now, what can you glean from those words?  
7 Well, one, she's actually admitting that other  
8 people at Dartmouth Health actually do these  
9 things, right? Other people. Not many, if not  
10 most, but that leads you to think, well, there's  
11 a couple people that do that.

12 And Dr. -- we'll get to Dr. Padin in a  
13 second. And you heard from her, right?  
14 Dr. Padin, she testified not once but twice.  
15 And during her first round of testimony  
16 Dr. Padin could not be more clear.

17 In 2017, June/July, 2017 the hospital  
18 needed a generalist to assist in labor and  
19 delivery. And despite Dr. Porter's dual  
20 appointment in OB/GYN and radiology, she didn't  
21 have current credentials or privileges in  
22 obstetrics. There is no dispute about that.  
23 This is not a factual dispute. Dr. Porter did  
24 not have privileges in obstetrics, period, full  
25 stop.

1           When Dr. -- and it's clear from the  
2           record that because she didn't have those  
3           privileges, she was not qualified to be  
4           reassigned to that position in the OB/GYN  
5           department in the summer of 2017.

6           And during her second stint of testimony  
7           Dr. Padin, this past Friday, which also seems  
8           like a long time ago, Dr. Padin says she  
9           performed many procedures under the umbrella of  
10          the reproductive endocrinology, advanced  
11          laparoscopies -- I'm definitely saying that  
12          wrong -- myomectomies, robotic surgeries.  
13          Right? She said all these things. She  
14          performed these surgeries.

15          And, remember, Dr. Padin is the one that  
16          proctored that surgery back in April for  
17          Dr. Porter, and she proctored it because she has  
18          those privileges. She does those surgeries.

19          There was no vacant, open, existing open  
20          position for Dr. Porter at that point. And  
21          under the law we submit, under the ADA Rehab  
22          Act, the state disability discrimination laws,  
23          there was no open vacant position for her to be  
24          reassigned to as a potential reasonable  
25          accommodation.



1           Let me turn to whistleblower retaliation  
2           and why Dr. Porter cannot establish pretext, and  
3           you heard a little bit about that from  
4           Ms. Nunan.

5           Dr. Merrens had no knowledge of  
6           Dr. Porter's long trail of complaints about the  
7           other REI positions, meaning Dr. Hsu and Seifer,  
8           which dated back many years.

9           And, by the way, when we look at  
10          retaliation, think about that issue for a  
11          second. Well, her complaints about Dr. Hsu  
12          started in 2013, and somehow, even though she  
13          had complaints in 2013, '14, '15, '16, '17 about  
14          Dr. Hsu, somehow those complaints are the reason  
15          why she was terminated in May of '17. It  
16          doesn't ring true. It just doesn't.

17          Again, the evidence in the record, the  
18          exhibits before you, the witness testimony,  
19          which is corroborated, all of the points that  
20          I've presented to you.

21          She can't be considered a whistleblower  
22          because here Dr. Merrens had no knowledge of  
23          Dr. Porter's history of complaints. His  
24          decision to close the REI division was his  
25          decision alone, and Dr. Porter didn't make any

1 comments to Dr. Merrens. And think about that,  
2 right?

3 Back in 2012, 2013, she's got this  
4 dispute with the OB/GYN chair. She has  
5 Dr. Merrens there as kind of a neutral. She  
6 says very glowing things about him in  
7 Exhibits B, C and D, which are admitted into  
8 evidence, and then she doesn't go back to him  
9 when she's having any problems with anyone else  
10 in the REI division.

11 While she -- the record is clear. While  
12 she had relied upon his counsel and guidance on  
13 other earlier occasions, she had not spoken to  
14 him in a couple years. She certainly knew that  
15 she could reach out to him. She didn't do it.

16 Now, what about the other people  
17 involved?

18 Daniel Herrick, he says he didn't have  
19 any knowledge of complaints or concerns about  
20 Dr. Porter on anything. Heather Gunnell, ditto.

21 Now, Leslie DeMars certainly had been in  
22 communication with Dr. Porter about her range of  
23 grievances with Dr. Hsu and Seifer, but she  
24 was -- the record is clear in this case that she  
25 didn't tell Merrens, Herrick, or Gunnell about

1 Dr. Porter's complaints regarding Dr. Hsu and  
2 Seifer.

3 Let me just say that one more time  
4 because it's important. She didn't tell  
5 Merrens, Herrick, or Gunnell about Dr. Porter's  
6 specific complaints regarding Hsu and Seifer.

7 And that brings you then to the reason  
8 why there's no causal connection, right?  
9 There's an issue of engaging in protected  
10 activity. There's an adverse employment action.  
11 But the third prong of that, of a prima facia  
12 case for retaliation is a causal connection  
13 between the two things. There has to be a  
14 causal connection.

15 Dr. Porter's complaints about other  
16 physicians and nurses dates back at least ten  
17 years, and you heard from Dr. Stern, Kelly  
18 Mousley, Katie Mansfield, so it's not surprising  
19 that Dr. Porter had complaints about her newer  
20 colleagues.

21 And from shortly after Dr. Hsu started  
22 until the time of her termination, Dr. Porter  
23 reported concerns to Dr. DeMars. We're not  
24 saying that she didn't do that. We're not  
25 saying that. We're just saying that those

1 complaints, whatever they are, had nothing to do  
2 with her termination of her employment when they  
3 closed the REI division.

4 Because, remember, to the extent that  
5 Dr. Porter raised complaints in 2014, in 2015,  
6 in 2016 about Dr. Hsu, nothing negative happened  
7 to Dr. Porter during any of those periods of  
8 time.

9 You also heard testimony, and this is  
10 important for purposes of understanding the  
11 evidence and whether or not Dr. Porter meets her  
12 burden of proof. There were similar complaints  
13 by others in the REI division; Beth Todd,  
14 numerous complaints about Dr. Hsu and Seifer.

15 And while Dr. Porter complains she was  
16 retaliated against for making those identical  
17 complaints and for failing to be reassigned to  
18 an unknown, unspecific position, Beth Todd is  
19 still gainfully employed at Dartmouth Health  
20 today.

21 And you saw in Exhibit C-13, the last  
22 page talked about the fact that Beth Todd  
23 actually had a dual appointment and actually did  
24 a lot of work in OB/GYN, and she's the one  
25 person, the nurse practitioner who remained

1 employed at Dartmouth Health.

2 Finally -- and I appreciate everybody's  
3 patience in listening and attentiveness -- let  
4 me get to the subject of damages.

5 We didn't put an expert on the stand  
6 because we don't think you should even get to  
7 the subject of damages at all, but let me make a  
8 few comments about it.

9 You heard from Dr. Bancroft, Dr. Porter's  
10 quote, unquote, hired gun. You have to make a  
11 decision on whether or not he was credible after  
12 multiple iterations of multiple reports and  
13 multiple conclusions about multiple numbers.

14 Yes, it's true, lawyers aren't great at  
15 math, but I'm not sure that this guy is either.  
16 And some of the members of the jury would  
17 remember an SNL character by Jon Lovitz who  
18 always said, Yeah, that's the ticket, and that's  
19 exactly who Dr. Bancroft is. Anything that  
20 Dr. Porter said or Dr. Porter's counsel said to  
21 him, he created new assumptions, he created new  
22 facts, and that's how he came up with his  
23 numbers.

24 You remember he said, Well, actually I  
25 didn't even have the documents initially. I

1           threw them away. But then he said my house  
2           burned down, and then he wasn't sure where they  
3           were. But on cross-examination he admitted that  
4           he hadn't been told some critical information.

5           Now, what is in the record is the fact  
6           that his opinions vary dramatically over the  
7           years. At one point he said it was 4.3 million  
8           dollars, and then it dropped all the way down to  
9           1.7 million dollars but it was still a grossly  
10          inflated number.

11          And then you get to the retirement age.  
12          In his earlier reports he said, well, you should  
13          look at 65 years old as the date she would  
14          retire. But when he had to actually reduce all  
15          of these assumptions for her potential damages  
16          all the way through 2033, he now says,  
17          magically, well, you got to assume that she was  
18          going to work until she was 70.

19          But it didn't stop there in terms of his  
20          manipulation of the assumptions. All of this is  
21          speculation and in an obvious attempt to juice  
22          up the numbers because he's moving the -- it's a  
23          sliding scale, and all of his reports are all  
24          over the place based on different assumptions.

25          And only this latest analysis, which he

1 did five days before trial where he had to now  
2 acknowledge that Dr. Porter was a full-time  
3 professor, doesn't really come through.

4 He now had -- he also tries to make an  
5 assumption. Well, she was going to reduce her  
6 schedule from 1.0 to .75 in July of this coming  
7 year. But when Mr. Coffin actually asked him to  
8 do the analysis, to do an apples-to-apples  
9 comparison, like, okay, if you're making  
10 assumptions that she was going to be 1.0 FTE,  
11 full-time equivalent at Dartmouth Health, you  
12 should at least do the same when she was working  
13 at UVM.

14 If he did the math, and he asked him to  
15 do it, and whether he disagreed with him or not,  
16 there was no basis for economic damages because  
17 by 2025 and further on she was actually earning  
18 more at UVM. There's no basis for economic  
19 damages. There's no basis for emotional  
20 distress. There's no basis for punitive  
21 damages, which is even an higher standard that  
22 Dr. Porter can't meet.

23 Because, remember, this comes back to  
24 credibility of witnesses and corroboration of  
25 evidence.

1           There are 90 exhibits and 20 witnesses.  
2           All of you listened to the evidence intently,  
3           took notes throughout the trial. Everybody  
4           appreciates that.

5           My final thoughts. Dartmouth Health's  
6           closure of the REI division in 2017 was done  
7           after thoughtful deliberation relating to its  
8           continuing viability. Dr. Merrens, Dr. Padin,  
9           Daniel Herrick, Heath Gunnell all testified it  
10          was the right call.

11          Dr. Merrens was here with you throughout  
12          the entire trial. You've got to judge his  
13          credibility, too, right? His testimony was  
14          unwaivering. He was emphatic. He made the  
15          decision to shut down the REI division  
16          altogether. He had no knowledge, no knowledge  
17          of Dr. Porter's disability, no knowledge of her  
18          complaints regarding Dr. Hsu and Seifer. Yet,  
19          he's the one that made the decision, and that's  
20          where legally Dr. Porter's claims fall apart.

21          He made the decision to shut down the REI  
22          division because it was a dumpster fire, for  
23          lack of a better term. It was never about  
24          Dr. Porter. It was about an unsalvageable  
25          program. That's what the Value Institute said.



1 And plaintiff's theory of the case  
2 consists of the following. Dartmouth Health  
3 concocted a plan to terminate her by closing an  
4 entire division, something it had never done  
5 before.

6 Ask yourself, would Dartmouth Health  
7 really have shut down a whole division,  
8 something it's never done before, just to get  
9 rid of one employee, especially a talented  
10 surgeon like Dr. Porter?

11 And I want you to look at the record.  
12 Look at the testimony and the exhibits against  
13 the credibility of the witnesses who came before  
14 you.

15 Respectfully we request that you render a  
16 verdict on behalf of Dartmouth Health in this  
17 case on all of Dr. Porter's claims.

18 Thank you.

19 THE COURT: Okay. Any rebuttal from the  
20 plaintiff?

21 REBUTTAL CLOSING ARGUMENT ON BEHALF OF  
22 PLAINTIFF:

23 MS. NUNAN: Attorney Schroeder stated  
24 that Dr. Porter had shamelessly exploited  
25 Patient Eunice Lee.

1 I specifically asked Eunice Lee why she  
2 had chosen to come forward and tell her very  
3 personal and painful story about her experience  
4 at Dartmouth Health. She was harmed by Dr. Hsu.  
5 Her response was, I'm one of many women, and I  
6 do not want to be a faceless name on a billing  
7 statement.

8 Her testimony came in the face of  
9 Dr. Merrens' statement at this trial: I am not  
10 aware of any actual harm. D-H does not want to  
11 talk about patient harm. It does not want you  
12 to consider patient harm, and this is why  
13 Dr. Porter spoke up. She could not tolerate it.  
14 She would not be quiet about it, and she could  
15 not watch these two doctors operate  
16 incompetently.

17 If Dr. Porter had accepted the severance  
18 package that Dr. -- that Attorney Schroeder  
19 keeps pointing out, all of this would have been  
20 swept under the rug. She wouldn't have been  
21 able to talk about it.

22 Attorney Schroeder labeled the women who  
23 came forward; Sharon Parent, Julia MacCallum,  
24 Vicky Maxfield, Janice Gonyea, and Dr. Karen  
25 George as Dr. Porter's friends. This is

1 insulting. These are women who have decades of  
2 professional experience as nurses and doctors  
3 who take their duty to report seriously, their  
4 duty to come and speak in public about these  
5 issues seriously. They are not Dr. Porter's  
6 friends first. They're professionals first.

7 Dr. Julia MacCallum testified that she  
8 reported what she saw in the OR at Dartmouth  
9 Health in 2015; Dr. Hsu's ripping and yanking in  
10 surgery. She reported that as a resident way  
11 before she became close with Dr. Porter.

12 Hospital transparency matters. It  
13 matters all the way to the top. What  
14 Dr. Merrens says, what Dr. Conroy says, the  
15 public has to trust what top administrators --  
16 that they're going to tell the truth.

17 What he says, what Dr. Merrens says to  
18 the staff and what he says to the media matters.  
19 The public has to trust that when they go to D-H  
20 to get services, women -- women like you, like  
21 your mom, your daughter, that the people who are  
22 there performing the procedures are qualified.

23 Dartmouth administrators had noticed in  
24 the summer of 2016 that they had two incompetent  
25 doctors on their hands. They allowed them to

1 perform procedures on women for another  
2 12 months.

3 This case is about patient harm and  
4 Dr. Porter holding Dartmouth Hitchcock  
5 accountable by speaking up loudly about it.

6 THE COURT: Okay, so that concludes  
7 closings arguments.

8 The next part of the case I'll be  
9 instructing you on the law. We're going to take  
10 our lunch break before I do that, but I do want  
11 to remind you, you do not have the case yet for  
12 deliberation, so you should not be speaking with  
13 each other. You should not be researching the  
14 case. You should not be talking to anyone about  
15 the case.

16 I'll ask you to come back and be ready to  
17 go at 12:45, at which time I will provide you  
18 instructions.

19 Okay? Thank you.

20 THE CLERK: All rise for the jury.

21 (The jury left the courtroom at  
22 11:38 a.m.)

23 (Court officers were administered their  
24 oath by the Clerk of Court.)

25 THE CLERK: All rise.

1 (Judge Doyle entered the courtroom.)

2 THE COURT: Issue to be taken up?

3 MR. SCHROEDER: Yes, your Honor.

4 Defendants want to move to strike the rebuttal  
5 statement for this specific reason; that what  
6 Ms. Nunan said quoting Eunice Lee was not  
7 actually what she said in the trial, as evidence  
8 in the record.

9 What Ms. Nunan said was, quote,  
10 attributing it to Ms. Lee, I'm one of many  
11 women, and I don't want to be a faceless name on  
12 a billing statement, end quote. That's not what  
13 she said.

14 In fact, she said, I can't be the only  
15 woman who is finding out about this way and the  
16 only woman who for years has been wondering did  
17 I do something wrong and was this my fault.

18 So, first of all, one, it wasn't said,  
19 and so attributing a quote to evidence in the  
20 record. All of our quotes were from the actual  
21 transcript, number one.

22 Number two, it wasn't said, and so  
23 there's the assumption that that was said, as if  
24 that's evidence.

25 Three, it implies that there's other --

1           there's other patients or other women that had  
2           made any complaints about Dr. Hsu.

3           And, fourth, it contradicts actually what  
4           she testified to. She has no idea.

5           So I wasn't going to do it during her  
6           rebuttal because I think that's poor form, but  
7           we're moving to strike that statement from the  
8           rebuttal statement because it is not accurate.  
9           It's not what the evidence in this record is.  
10          It's highly prejudicial, and it leaves -- it  
11          leaves sentiments of something that there is no  
12          evidence in the record to support.

13          THE COURT: Okay. Can you read again for  
14          me the statement that was made during rebuttal  
15          and the statement that you believe was made  
16          during the trial?

17          MR. SCHROEDER: Yes, your Honor, we  
18          checked with the court reporter.

19          The statement made during rebuttal was,  
20          and attributing to Eunice Lee, quote, I'm one of  
21          many women, and I don't want to be a faceless  
22          name on a billing statement, end quote.

23          THE COURT: Okay.

24          MR. SCHROEDER: That was never said in  
25          the trial of this case.

1           What she did say in the transcript of the  
2           trial of this case is, I can't imagine what --  
3           well, two things.

4           I can't be the only woman who is finding  
5           out about it this way and the only woman who for  
6           years has been wondering did I do something  
7           wrong or was this my fault, question mark, and  
8           not knowing what.

9           Further down in her answer, I can't  
10          imagine what other women are going through, and  
11          I kept thinking there has to be a face to this  
12          and a person who was assigned to this that --  
13          that this is what it has caused and the pain is  
14          still here and just as raw after ten years, end  
15          quote.

16                THE COURT:   Okay.

17                Plaintiff?

18                MR. JONES:   We're trying to pull up the  
19                transcript, but I believe it is a very fair  
20                summary of what was said.

21                There were two statements that Ms. Lee  
22                made in her testimony. One was referencing  
23                other women and that she was one of other women,  
24                and the other one was that she, when asked why  
25                she was doing this, there was a reference to not

1 just being a faceless name on a billing  
2 statement. That was, I believe, in the  
3 testimony.

4 MR. SCHROEDER: Judge, we actually  
5 ordered the transcript.

6 MR. JONES: So did we.

7 MR. SCHROEDER: The whole transcript?  
8 You did?

9 MR. JONES: Parts.

10 MR. SCHROEDER: Parts. You didn't order  
11 that part.

12 Judge, I would ask the Court to just  
13 please review this issue. It's highly  
14 prejudicial. That testimony should -- we've  
15 already had our arguments on that issue of  
16 whether or not the testimony should have even  
17 happened, but this is now going one step beyond  
18 even that, and I respectfully ask the Court to  
19 please review it.

20 THE COURT: Okay. And are you asking for  
21 it to be stricken and not replaced by the actual  
22 testimony on that point? Just stricken?

23 MR. SCHROEDER: I ask that it be stricken  
24 completely. I don't think it should be replaced  
25 at all.



1 THE COURT: Okay. So I am going to want  
2 written copies of the two statements that you  
3 just mentioned. I didn't write it down. I was  
4 listening to you.

5 MR. SCHROEDER: That's okay. I'll be  
6 happy to get that.

7 Well, I'd have to ask the court reporter  
8 to print it out first, but we took it down  
9 verbatim.

10 THE COURT: Okay. Anything further from  
11 plaintiff in response to this about a potential  
12 remedy?

13 MS. NUNAN: Okay. And, but the third  
14 party, and maybe this -- like the most important  
15 part for me is I keep thinking, what about us?  
16 Like what about the patients? I can't be the  
17 only woman who is finding out about it this way  
18 and the only woman who for years has been  
19 wondering did I do something wrong, and was this  
20 my fault? And not knowing what, and just like  
21 anger and disappointment and sadness. I didn't  
22 want us to just be nameless patients out of like  
23 a billing statement.

24 THE COURT: That's the trial testimony?

25 MS. NUNAN: This is on Page 19 of the

1 trial transcript of Eunice Lee.

2 THE COURT: So please provide me with  
3 both statements. I'm going to take a look at it  
4 before we bring the jury back. Okay?

5 THE CLERK: All rise.

6 (Judge Doyle left the courtroom at  
7 12:56 p.m.)

8 (The court reporter provided Judge Doyle,  
9 in chambers, the statement from Ms. Nunan's  
10 closing argument.)

11 (The following took place in open court  
12 without the jury present, at 1:08 p.m.)

13 THE COURT: Okay. So with respect to the  
14 request to strike the statement made during  
15 rebuttal, I have reviewed the trial testimony of  
16 Ms. Lee as well as the statement that was made  
17 in plaintiff's rebuttal.

18 So with respect to the trial testimony,  
19 this is a reference to Page 19, the relevant  
20 part, Lines 4 to 20. In the trial testimony  
21 Ms. Lee, again in relevant part, said, I can't  
22 be the only woman who is finding out about it  
23 this way and the only woman who, for years, has  
24 been wondering did I do something wrong and was  
25 this my fault. And not knowing that, and it

1 just -- I have like anger and disappointment and  
2 sadness, and I didn't want us just to be these  
3 nameless patients out of like a billing  
4 statement. So that is the trial testimony.

5 The statement on rebuttal is, quote -- by  
6 Ms. Nunan attributing this to Ms. Lee -- I am  
7 one of many women, and I don't want to be a  
8 faceless name on a billing statement.

9 So I don't think -- well, first off,  
10 counsel is permitted to summarize testimony that  
11 came in at trial. It certainly can't be  
12 inaccurate, but I don't think in comparing these  
13 two statements that the message is frankly that  
14 inconsistent.

15 It's a reference to other women not being  
16 a faceless name on a billing statement, so I  
17 just don't think that rises to the level that I  
18 need to strike it. So I won't be striking that  
19 statement from the record.

20 Okay. Is there anything else to take up  
21 at this time, or can we bring the jury in?

22 MR. JONES: Not from us.

23 MR. SCHROEDER: Nothing, your Honor.

24 (The jury entered the courtroom at  
25 1:11 p.m.)

JURY CHARGE BY THE COURT:

THE COURT: Members of the jury, at this time I'm going to be providing you with my instructions that will guide your deliberations.

As you can see on your seats, you have also received a written copy. This is the jury instructions charge that I will be reading to you now so you can follow along. It is a 33-page document, so it may take a little while, but okay.

Now that you have heard the evidence and arguments, it is my duty to instruct you on the applicable law. My instructions come in two parts.

The first part consists of general instructions about the task of the jury and the rules and principals that should guide you in your deliberations. The second part consists of instructions that apply to the specific claims and defenses in this case. I ask that you pay equal attention to both parts.

It is your duty as jurors to follow the law and to apply it to the facts as you find them from the evidence presented in the courtroom. You are not to single out one

1 instruction alone as stating the law but must  
2 consider the instructions as a whole.

3 You are not to be concerned with the  
4 wisdom of or reason behind any rule of law  
5 stated by the Court. Regardless of any opinion  
6 you may have as to what the law is or ought to  
7 be, it would be a violation of your sworn duty  
8 to base a verdict on any view of the law other  
9 than that given to you in these instructions.

10 It would also be a violation of your  
11 sworn duty as judges of the facts to base a  
12 verdict upon anything other than the evidence  
13 presented during the trial.

14 The lawyers have referred to some of the  
15 rules of law in their arguments. If any  
16 difference appears between the law as stated by  
17 the lawyers and the law as stated by the Court  
18 in these instructions, you must follow the  
19 Court's instructions.

20 Our judicial system requires that you  
21 carefully and impartially consider all of the  
22 evidence, follow the law, and reach a just  
23 verdict regardless of the consequences.

24 Jurors as finders of fact/rulings of the  
25 Court:

1           You and you alone are the triers of the  
2           facts. Each of you as jurors must determine the  
3           facts for yourself in reaching a verdict. By  
4           the rulings that I made during the course of the  
5           trial I did not intend to express my own views  
6           about this case.

7           Sympathy/prejudice:

8           Neither sympathy nor prejudice for or  
9           against the parties or any other person involved  
10          with this case should influence you in any  
11          manner in reaching your verdict. Your  
12          deliberations should be well reasoned and  
13          impartial.

14          Evidence in the case:

15          The evidence in this case consists of the  
16          sworn testimony of the witnesses, the exhibits  
17          admitted into evidence and any stipulated facts,  
18          regardless of which party presented the  
19          evidence.

20          When the attorneys on both sides  
21          stipulate or agree to the existence of the fact,  
22          you must, unless other instructed, accept the  
23          stipulation and regard that fact as proved. You  
24          may give the stipulated fact, like any other  
25          evidence, the weight you think it deserves.

1 Any evidence that has been stricken or  
2 excluded, as when an objection is sustained by  
3 the Court, must be disregarded, and you may not  
4 consider it in rendering your verdict.

5 Arguments, statements, objections of the  
6 attorneys:

7 The opening statements and closing  
8 arguments of the attorneys, their questions and  
9 objections and all other statements they made  
10 during the course of the trial are not evidence.  
11 The attorneys have a duty to object to evidence  
12 that they believe is not admissible. You should  
13 not draw any conclusions or make any judgment  
14 from the fact that an attorney has objected to  
15 the evidence.

16 The Court's ruling on objections:

17 From time to time the Court has been  
18 called on to determine the admissibility of  
19 certain evidence following the attorney's  
20 objections. You should not concern yourself  
21 with the Court's reason for any rulings on  
22 objections.

23 Whether offered evidence is admissible is  
24 purely a question of law for the Court and not a  
25 concern of the jury. In admitting evidence to

1 which objections have been made, the Court does  
2 not determine what weight should be given to  
3 that evidence, nor does it assess the  
4 credibility of the evidence.

5 If the Court excludes evidence in  
6 response to an objection, attorney's objection,  
7 you will dismiss the evidence from your mind  
8 completely and entirely, and you will refrain  
9 from the speculation about the nature of any  
10 exchange regarding the evidence between the  
11 Court and the attorneys held out of your  
12 hearing.

13 Evidence, direct or circumstantial:

14 There are two types of evidence from  
15 which you may find the facts of this case;  
16 direct and circumstantial.

17 Direct evidence is the testimony of  
18 someone who asserts actual knowledge of a fact,  
19 such as an eyewitness.

20 Circumstantial evidence is prove of a  
21 chain of facts and circumstances tending to  
22 prove or disprove an issue in the case.

23 For example, if a witness were to testify  
24 that he or she had seen cows in a field, that  
25 would be an example of direct evidence that



1           there were cows in a field.

2           On the other hand, if a witness were to  
3           testify that he or she had seen cow tracks in  
4           the field, that would be an example of  
5           circumstantial evidence that there had been cows  
6           in the field.

7           The law does not require a party to prove  
8           its claims or defenses by direct evidence alone.  
9           Rather, one or more of the essential elements of  
10          each of the claims or defenses may be  
11          established by a reasonable inference from other  
12          facts which are established by direct testimony.

13          And circumstantial evidence alone may be  
14          sufficient proof. The law makes no distinction  
15          between the weight to be given to direct or  
16          circumstantial evidence, nor is a greater degree  
17          of certainty required with circumstantial  
18          evidence than of direct evidence. You should  
19          consider all the evidence in the case and give  
20          it as much or as little weight as you think it  
21          deserves.

22               Credibility of the witnesses:

23           You are the sole judges of the  
24           credibility of the witnesses, and the weight to  
25           give their testimony is up to you. In

1 considering the testimony of any witness, you  
2 may take into account his or her ability and  
3 opportunity to observe, his or her demeanor  
4 while testifying, any interest or bias he or she  
5 may have, and the reasonableness of his or her  
6 testimony considered in light of all the  
7 evidence in the case.

8 Consider, also, any relation each witness  
9 may bear to either side of the case, any bias or  
10 prejudice, the manner in which each witness  
11 might be affected by the verdict, and the extent  
12 to which each witness's testimony is either  
13 supported or contradicted by other evidence in  
14 the case.

15 Inconsistencies or discrepancies in the  
16 testimony of a witness or between the testimony  
17 of different witnesses may or may not cause you  
18 to discredit a witness's testimony. Two or more  
19 persons witnessing an incident or transaction  
20 may see or hear it differently. It is your duty  
21 to reconcile conflicting testimony, if you can.

22 In weighing the effect of a discrepancy  
23 consider whether it pertains to a matter of  
24 importance or to an unimportant detail and  
25 whether the discrepancy may result from innocent

1 error or intentional falsehood.

2 You may give the testimony of each  
3 witness the amount of weight you think it  
4 deserves. You may believe all of it, part of  
5 it, or none of it at all. You do not have to  
6 accept the testimony of any witness, even if it  
7 is uncontradicted. It is for you to say what  
8 you believe and disbelieve.

9 In other words, what you must try to do  
10 in deciding credibility is to size up a witness  
11 in light of his or her demeanor, the  
12 explanations given, and all the other evidence  
13 in the case. Always remember that you should  
14 use your common sense and good judgment.

15 Impeachment of a witness:

16 A witness may be discredited or impeached  
17 by contradictory evidence by a showing that the  
18 witness testified falsely concerning a matter or  
19 by evidence that at some other time the witness  
20 said or did something inconsistent with the  
21 witness's present testimony.

22 It is your exclusive province to give  
23 testimony of each witness whatever degree of  
24 credibility or amount of weight you think it  
25 deserves. If you find that a witness testified

1 untruthfully in some respect, you may consider  
2 that fact in deciding what credence to attach to  
3 other testimony from that witness.

4 Considering that fact, as well as all  
5 other relevant evidence, you may accept or  
6 reject testimony of the witness in whole or in  
7 part. In making this determination, you may  
8 consider whether the witness purposely made a  
9 false statement or merely made an innocent  
10 mistake, whether the inconsistency concerns an  
11 important fact or a small detail, and whether  
12 the witness had a reasonable explanation for the  
13 inconsistency.

14 Expert witnesses:

15 You have heard evidence from one witness,  
16 Dr. Robert Bancroft, who is known as an expert  
17 witness. An expert witness is a person who has  
18 special knowledge, experience, training, or  
19 education in his or her profession or area of  
20 study. Because of his expertise, an expert  
21 witness may offer an opinion about one or more  
22 of the issues in the case.

23 In evaluating the testimony of  
24 Dr. Bancroft in this case you should evaluate  
25 his credibility and statement just as you would

1 for any other witness. You should also evaluate  
2 whether Dr. Bancroft's opinion is supported by  
3 the facts that have been proved and whether the  
4 opinion is supported by Dr. Bancroft's  
5 knowledge, experience, training, or education.

6 You are not required to give the  
7 testimony of Dr. Bancroft any greater weight  
8 than you believe it deserves just because he has  
9 been referred to as an expert witness.

10 Number of witnesses:

11 The fact that one side may have called  
12 more witnesses than the other side is of no  
13 significance. Your task is to evaluate the  
14 credibility of witnesses and to weigh all of the  
15 evidence.

16 Personal knowledge and experience of  
17 jurors:

18 In deliberating you are not expected to  
19 put aside your common sense, nor your own  
20 observations and life experience. However, a  
21 juror having special knowledge of a subject may  
22 neither state this knowledge to fellow jurors,  
23 nor act upon it himself or herself in arriving  
24 at a verdict. You must not tell your fellow  
25 jurors about matters that are based on your own

1 special knowledge concerning an issue in a case  
2 that did not come from the evidence received in  
3 the courtroom.

4 As jurors your job is to decide this case  
5 based solely on the evidence presented during  
6 the trial and my instructions to you. As you  
7 were instructed at the beginning of the trial,  
8 you are not to investigate or research the law  
9 or facts relevant to the trial.

10 I remind you that you must not seek or  
11 receive any information about this case from the  
12 internet, including Google, Facebook, Wikipedia,  
13 or any other websites or from any other source,  
14 including newspapers, magazines, law books or  
15 dictionaries. Do not search for or receive any  
16 information from the party, the lawyers, the  
17 witnesses, the evidence, the law, or any place  
18 or location mentioned in the trial.

19 Until I tell you that your jury service  
20 is completed, do not communicate with anyone,  
21 including your family and friends, about the  
22 evidence or issues in this case.

23 Burden of proof/preponderance of the  
24 evidence:

25 Because Dr. Porter is the one bringing

1           this case, she has the burden of proof. She  
2           must prove each essential element of the claim  
3           she alleges by what is known as a preponderance  
4           of the evidence; i.e., the greater weight of the  
5           evidence.

6                   To establish a fact by a preponderance of  
7           the evidence means to prove that the fact is  
8           more likely true than not. In other words, a  
9           preponderance of the evidence means evidence  
10          that, when considered and compared with the  
11          evidence opposed to it, has more convincing  
12          force and produces in your minds a belief that  
13          what is sought to be proved is more likely true  
14          than not true.

15                   A preponderance of the evidence refers to  
16          the quality and persuasiveness of the evidence,  
17          not to the number of witnesses or documents.

18                   In determining whether a claim has been  
19          proven by a preponderance of the evidence, you  
20          may consider the relevant testimony of all the  
21          witnesses regardless of who called them, and all  
22          exhibits received into evidence regardless  
23          perform who submitted them.

24                   If you find that the credible evidence on  
25          an issue is evenly divided between the parties,

1           you must decide that issue against the party  
2           having the burden of proof. That rule follows  
3           from the fact that the party bearing its burden  
4           must prove more than simple equality of  
5           evidence. He or she must prove the element at  
6           issue by a preponderance of the evidence.

7           On the other hand, the party with its  
8           burden of proof need prove no more than a  
9           preponderance. So long as you find that the  
10          scales tip, however slightly, in favor of the  
11          party with its burden of proof, meaning what  
12          that party claims is true is more likely true  
13          than not true, then that element will have been  
14          proven by a preponderance of the evidence.

15          If, after considering all the evidence,  
16          you are satisfied that Dr. Porter has carried  
17          her burden on at least one of the claims she  
18          alleges, then you must find for Dr. Porter on  
19          that, those claims.

20          On the other hand, if after such  
21          consideration you find the evidence to be in  
22          balance or equally probable, or if you find the  
23          evidence tips in favor of Dartmouth Health, then  
24          Dr. Porter has failed to sustain her burden and  
25          you must find for Dartmouth Health on those



1 claims.

2 All persons equal before the law:

3 The fact that Dartmouth Health is a  
4 corporation and Dr. Porter is an individual must  
5 not enter into or affect your verdict. This  
6 case should be considered and decided by you as  
7 a dispute between parties of equal standing in  
8 the community. All persons, both corporations  
9 and individuals, stand equal before the law and  
10 are to be treated as equals in a court of  
11 justice.

12 Corporation acts through its employees:

13 Defendants Dartmouth Hitchcock Medical  
14 Center, Dartmouth-Hitchcock Clinic, Mary  
15 Hitchcock Memorial Hospital, and  
16 Dartmouth-Hitchcock Health referred to  
17 throughout this trial and in this document as  
18 Dartmouth Health are corporate entities.

19 A corporation acts through its employees.  
20 Therefore, the act of a Dartmouth Health  
21 employee that occurred while he or she was on  
22 duty and acting within the scope of his or her  
23 employment duties shall be consider the act of  
24 Dartmouth Health.

25 Influenced decisionmaker:

1           An employee may be liable for unlawful  
2           acts even when so-called neutral decisionmakers  
3           made a final decision regarding the act if the  
4           employee proves by a preponderance of the  
5           evidence that the neutral decisionmaker relied  
6           on a supervisor who had an unlawful bias or  
7           retaliatory motive against the employees.

8           In other words, if you find that  
9           Dr. Merrens was the decisionmaker regarding the  
10          termination of Dr. Porter's employment without  
11          reassignment to another position at Dartmouth  
12          Health and if you find that Dr. Merrens did not  
13          personally have an unlawful bias or retaliatory  
14          motive against Dr. Porter, Dartmouth Health may  
15          nonetheless be held liable if you find, by a  
16          preponderance of the evidence, that a supervisor  
17          of Dr. Porter's, like Dr. DeMars, had an  
18          unlawful bias or retaliatory motive to terminate  
19          Dr. Porter without reassignment to another  
20          position at Dartmouth Health and Dr. Merrens  
21          relied on that supervisor when deciding to  
22          terminate Dr. Porter's employment without  
23          reassignment to another position at Dartmouth  
24          Health.

25               Overview of claims:

1 As you have seen and heard in this trial,  
2 this is an employment lawsuit brought by  
3 Dr. Misty Blanchette Porter against Dartmouth  
4 Health. Dr. Porter claims that she was  
5 terminated by Dartmouth Health because of her  
6 whistleblower complaints about conduct by other  
7 physicians and because of her disability.

8 Dartmouth Health claims it had  
9 legitimate, non-discriminatory business reasons  
10 for terminating employment of Dr. Porter in  
11 conjunction with the closure of Dartmouth  
12 Health's Reproductive, Endocrinology and  
13 Infertility (REI) Division.

14 Now I will instruct you regarding each of  
15 Dr. Porter's claims; one, violation of the New  
16 Hampshire Whistleblowers' Protection Act; two,  
17 disability discrimination and retaliation under  
18 the Americans with Disabilities Act (ADA), the  
19 Rehabilitation Act, and the applicable laws of  
20 New Hampshire and Vermont; three, wrongful  
21 discharge under New Hampshire law; and, four,  
22 retaliation under the applicable laws of New  
23 Hampshire. I will also instruct you regarding  
24 Dartmouth Health's defenses and regarding  
25 damages.

1 New Hampshire Whistleblowers' Protection  
2 Act. Dr. Porter alleges that she was terminated  
3 by Dartmouth Health and was not reassigned to  
4 another position at Dartmouth Health in  
5 retaliation for her reporting about and/or  
6 advising others to report about the conduct of  
7 two physicians at Dartmouth Health that she  
8 reasonably believed to be illegal, fraudulent,  
9 unethical, or harmful to patients in violation  
10 of New Hampshire's Whistleblowers' Protection  
11 Act.

12 Dartmouth Health denies these claims and  
13 asserts that it had legitimate business reasons  
14 for its decision to terminate Dr. Porter's  
15 employment and not reassign her to another  
16 position with Dartmouth Health.

17 New Hampshire's Whistleblowers'  
18 Protection Act prohibits employers from  
19 retaliating against an employee for reporting  
20 what he or she reasonably believes is a  
21 violation of the law. The act safeguards  
22 employees from being discriminated against for  
23 making a good faith report verbally or in  
24 writing.

25 Its purpose is to encourage employees to

1           come forward and to report violations without  
2           fear of losing their jobs and to ensure that as  
3           many alleged violations as possible are resolved  
4           informally within the workplace.

5           In order to establish a claim under New  
6           Hampshire's Whistleblowers' Protection Act,  
7           Dr. Porter must demonstrate by a preponderance  
8           of the evidence the following three elements:

9           First, Dr. Porter, in good faith,  
10          reported or caused to be reported what she had  
11          reasonable cause to believe was a violation of  
12          any law or rule adopted under the laws of New  
13          Hampshire, a political subdivision of New  
14          Hampshire or the United States.

15          Second, Dartmouth Health terminated  
16          Dr. Porter's employment and failed to reassign  
17          her to another job at Dartmouth Health.

18          And, third, there was causal connection  
19          between Dr. Porter's reporting and her  
20          termination from Dartmouth Health without  
21          reassignment to another job at Dartmouth Health.

22          One, reported in good faith.

23          In this context good faith means absence  
24          of malice and honesty of intention. Reporting  
25          in good faith means the employee reasonably

1 believed that a violation of a law or a rule was  
2 happening. The employee did not prove that a  
3 violation of a law or rule was, in fact,  
4 happening.

5 In other words, the act does not require  
6 an actual violation of a law or rule but only  
7 that an employee reasonably believed that such a  
8 violation has occurred.

9 In regarding a violation to her employer,  
10 the employee is not required to reference any  
11 specific law or rule that the employer has  
12 allegedly violated. The employer is presumed to  
13 be familiar with the laws and regulations  
14 governing its business and to consider a report  
15 to have been made if a reasonable employer would  
16 have understood from an employee's complaint  
17 that the employee was reciting a violation of  
18 law.

19 Two, termination of employment. You must  
20 decide whether Dartmouth Health terminated  
21 Dr. Porter's employment and did not reassign her  
22 to another job at Dartmouth Health.

23 Three, causal connection. To find in  
24 favor of Dr. Porter on this claim, you must find  
25 a causal connection between her termination and

1 her reporting about and/or advising others to  
2 report about the conduct of two physicians at  
3 Dartmouth Health that she reasonably believed to  
4 be illegal, fraudulent, unethical, or harmful to  
5 patients.

6 In other words, you must find that  
7 Dr. Porter's termination occurred because of her  
8 reporting. This may be shown by circumstantial  
9 evidence.

10 For example, you may find that there is  
11 sufficient causation through temporal proximity;  
12 that is, that Dartmouth Health's termination of  
13 Dr. Porter followed shortly after Dartmouth  
14 Health became aware of Dr. Porter's reporting.

15 Other ways you may find causation could  
16 be through, A, Dartmouth Health's disparate  
17 treatment of Dartmouth fellow employees who  
18 engaged in similar conduct as Dr. Porter or, B,  
19 deficiencies in Dartmouth Health's articulated  
20 reasons for terminating Dr. Porter.

21 In addition, to support the required  
22 finding of causation for this claim you must  
23 find that Dr. Porter reported the alleged  
24 violations to a person having supervisory  
25 authority over her.

1 In other words, at least one supervisor  
2 or decisionmaker at Dartmouth Health must have  
3 known that Dr. Porter had reported about and had  
4 advised others to report about the conduct that  
5 she believed to be illegal, fraudulent,  
6 unethical, or harmful to patients.

7 Dartmouth Health claims it did not  
8 terminate Dr. Porter because of her  
9 whistleblowing activity; here, reporting that  
10 two Dartmouth Health physicians were engaging in  
11 conduct that she thought was unlawful,  
12 unethical, or dangerous to patients, but rather  
13 because it made a business decision to close its  
14 REI division, resulting in the termination of  
15 all three physicians in the division, and that  
16 there was no other position to which Dr. Porter  
17 could be reassigned at Dartmouth Health.

18 Dr. Porter asserts that the reasons given  
19 for her termination are not the true reasons but  
20 instead are a pretext or excuse to cover up  
21 Dartmouth Health's unlawful retaliation against  
22 her for whistleblowing.

23 If you do not believe the reasons that  
24 Dartmouth Health has offered for termination of  
25 Dr. Porter's employment and not reassigning her,



1 then you may, but are not required to, infer  
2 that retaliation was a factor that made a  
3 difference in Dartmouth Health's decision to  
4 terminate Dr. Porter's employment and not  
5 reassign her to another job at Dartmouth Health.

6 Americans with Disabilities Act (ADA)  
7 claim.

8 In this case Dr. Porter claims that  
9 Dartmouth Health terminated her employment and  
10 did not reassign her to another division because  
11 of her disability. Dr. Porter has reported  
12 three distinct but related types of disability  
13 discrimination claims.

14 First, Dr. Porter may prove that  
15 Dartmouth Health would not have terminated her  
16 employment but for her disability.

17 Second, Dr. Porter may prove that  
18 Dartmouth Health failed to reasonably  
19 accommodate her disability by reassigning her to  
20 another division instead of terminating her  
21 employment.

22 Third, Dr. Porter may prove that  
23 Dartmouth Health retaliated against her for  
24 making a reasonable accommodation request.

25 You must determine whether Dr. Porter has

1 proven that Dartmouth Health discriminated  
2 against her because of her disability in any or  
3 all of these ways or none of these ways.

4 For Dr. Porter to prove her ADA claim  
5 against Dartmouth Health, she must prove that  
6 Dartmouth Health discriminated against her in at  
7 least one of these ways:

8 One, but-for discrimination. To prevail  
9 under this theory, Dr. Porter must prove all of  
10 the following by a preponderance of the  
11 evidence.

12 First: Dartmouth Health is an employer  
13 subject to the ADA.

14 Second: Dr. Porter has a disability  
15 within the meaning of the ADA.

16 Third: Dr. Porter was otherwise  
17 qualified to perform the essential functions of  
18 her job, either with or without reasonable  
19 accommodation.

20 Fourth: Dr. Porter was terminated  
21 because of her disability.

22 To prevail under this theory Dr. Porter  
23 must prove all of the following by a  
24 preponderance of the evidence:

25 1.1. Employer. The parties have agreed

1 on the first element that Dartmouth Health is an  
2 employer subject to the ADA. Thus, the first  
3 element is satisfied.

4 1.2. Disability. The parties have  
5 agreed on the second element; that Dr. Porter  
6 has a disability as defined by the ADA. Thus,  
7 the second element is satisfied.

8 1.3. Otherwise qualified to perform  
9 essential functions. You must determine whether  
10 Dr. Porter was a qualified individual to satisfy  
11 this element.

12 Dr. Porter must prove two things by a  
13 preponderance of the evidence. First, that she  
14 was otherwise qualified for the position she  
15 held and, second, that either with or without  
16 reasonable accommodation she could perform the  
17 essential functions of that position.

18 1.3.1. Otherwise qualified.

19 An individual is otherwise qualified if  
20 they have the requisite skill, experience,  
21 education, and other job-related requirements of  
22 the employment position involved in the case.

23 If Dr. Porter cannot satisfy this  
24 standard, then she is not a qualified  
25 individual, even if the reason that Dr. Porter

1 is not qualified is solely a result of her  
2 disability. The ADA does not require an  
3 employer to hire or retain an individual who  
4 cannot perform the job in question, either with  
5 or without an accommodation.

6 1.3.2. Essential functions.

7 If you find that Dr. Porter was otherwise  
8 qualified, then the next step is to determine  
9 whether she has proven by a preponderance of the  
10 evidence that she was able to perform the  
11 essential functions of the position either with  
12 or without reasonable accommodation.

13 A reasonable accommodation may include  
14 job restructuring or part-time or modified work  
15 schedule. To make this determination, you will  
16 need to determine the essential functions of the  
17 employment position.

18 The essential functions of an employment  
19 position are the basic fundamental duties of a  
20 job that a person must be able to perform to  
21 hold a particular position. Essential functions  
22 do not include marginal job duties or position.

23 A job function may be considered  
24 essential for any of several reasons. These  
25 include but are not limited to the following.

1           One, the reason that the position exists  
2           is to perform that function; two, there are a  
3           limited number of employees available among whom  
4           the performance of that job function can be  
5           distributed; and, three, the job function is  
6           highly specialized, and the person in that  
7           position is hired for their expertise or ability  
8           to perform that particular job function.

9           In determining whether a particular job  
10          function is essential, you may, along with all  
11          of the evidence that has been presented to you,  
12          consider the following factors.

13          A. The employer's judgment as to which  
14          functions of the job are essential.

15          B. Written job instructions prepared by  
16          the employer for advertising or position.

17          C. Written job instructions prepared by  
18          the employer for use in interviewing applicants  
19          for the position.

20          D. The amount of time spent performing a  
21          function.

22          E. The consequences of not requiring the  
23          person holding the position to perform the  
24          function.

25          F. The terms of any collective

1 bargaining agreement.

2 G. The work experience of the past  
3 employees who have held the position.

4 And H. The work experience of current  
5 employees who hold similar positions.

6 An employee must have been able to  
7 perform all of the essential functions of the  
8 position either with or without reasonable  
9 accommodation at the time of their termination.

10 An employer may not base an employment  
11 decision upon speculation that the employee's  
12 disability might worsen to the extent that they  
13 would not be a qualified individual at some time  
14 in the future.

15 On the other hand, an employer is not  
16 required to speculate that an employee's  
17 condition will improve if that employee is not  
18 able to fulfill all of the essential functions  
19 of the position at the time in question.

20 1.4. You must determine whether  
21 Dartmouth Health terminated Dr. Porter's  
22 employment because of her disability. An  
23 employee must prove that the employer would not  
24 have terminated their employment but for that  
25 disability.

1 To determine that Dartmouth Health  
2 terminated Dr. Porter because of her disability,  
3 you must decide that Dartmouth Health would not  
4 have terminated Dr. Porter had Dr. Porter not  
5 had a disability but everything else had been  
6 the same.

7 An employee does not need to prove that  
8 discrimination was the only or even the  
9 predominant factor that motivated an employer.  
10 You may decide that other factors were involved  
11 in the decision to terminate Dr. Porter's  
12 employment. But, for Dr. Porter to meet her  
13 burden, you must conclude that she has proved by  
14 a preponderance of the evidence that, although  
15 there may have been other factors, she would not  
16 have been terminated if she had not had a  
17 disability.

18 An employer may not discriminate against  
19 an employee because of the employee's  
20 disability. But an employer may terminate an  
21 employee for any other lawful reason, good or  
22 bad, fair or unfair. An employer is entitled to  
23 make subjective policy and business judgments,  
24 and an employer may therefore terminate an  
25 employee, even an outstanding employee, for

1 reasons that it considers to be in its best  
2 interests. An employer is entitled to make its  
3 own personnel decisions, however misguided they  
4 may appear to you.

5 If you believe Dartmouth Health's reasons  
6 for its decision to terminate Dr. Porter and  
7 find that its decision was not because of  
8 Dr. Porter's disability, you must not substitute  
9 your own judgment, even if you do not agree with  
10 Dartmouth Health's decision.

11 As I have explained, Dr. Porter has the  
12 burden to prove that Dartmouth Health's decision  
13 to discharge her was because of her disability.  
14 I've explained to you that evidence can be  
15 direct or circumstantial. To decide whether  
16 Dartmouth Health's decision to discharge  
17 Dr. Porter was because of her disability, you  
18 may consider the circumstances of Dartmouth  
19 Health's decision.

20 For example, you may consider whether you  
21 believed the reasons Dartmouth Health gave for  
22 their decision. If you do not believe the  
23 reasons it gave for the decision, you may  
24 consider whether the reasons were so  
25 unbelievable that they are a coverup to hide the



1 true discriminatory reason for the decision.

2 Two. Failure to grant reasonable  
3 accommodation request.

4 An employee may also establish a claim  
5 under the ADA by showing that the employer  
6 failed to provide a reasonable accommodation.  
7 To establish such a claim, Dr. Porter must prove  
8 each of the following elements by a  
9 preponderance of the evidence.

10 First: Dartmouth Health is an employer  
11 subject to the ADA.

12 Second: Dr. Porter has a disability  
13 within the meaning of the ADA.

14 Third: Dr. Porter was otherwise  
15 qualified to perform the essential functions of  
16 her job, either with or without reasonable  
17 accommodation.

18 Fourth: Dartmouth Health failed to make  
19 a reasonable accommodation.

20 2.1. Employer.

21 The parties have agreed on the first  
22 element; that Dartmouth Health is an employer  
23 subject to the ADA. Thus, the first element is  
24 satisfied.

25 2.2. Disability.

1           The parties have agreed on the second  
2           element; that Dr. Porter has a disability as  
3           defined by the ADA. Thus, the second element is  
4           satisfied.

5           2.3. Otherwise qualified to perform  
6           essential functions.

7           You must determine whether Dr. Porter was  
8           a qualified individual. To satisfy this element  
9           Dr. Porter must prove two things by a  
10          preponderance of the evidence. First, that she  
11          was otherwise qualified for the position she  
12          desired and, second, that either with or without  
13          reasonable accommodation she could perform the  
14          essential functions of that position.

15          2.3.1. Otherwise qualified.

16          An individual is otherwise qualified if  
17          they have the requisite skill, experience,  
18          education, and other job-related requirements of  
19          the employment position involved in the case.  
20          If Dr. Porter cannot satisfy the standard, then  
21          she was not a qualified individual, even if the  
22          reason that Dr. Porter is not qualified is  
23          solely a result of her disability.

24          The ADA does not require an employer to  
25          hire or retain an individual who cannot perform

1 the job in question, either with or without a  
2 reasonable accommodation.

3 2.3.2. Essential functions.

4 If you find that Dr. Porter was otherwise  
5 qualified, then the next step is to determine  
6 whether she has proven by a preponderance of the  
7 evidence that she was able to perform the  
8 essential functions of the position either with  
9 or without reasonable accommodation.

10 A reasonable accommodation may include  
11 job restructuring or part-time or modified work  
12 schedules. To make this determination, you will  
13 need to determine the essential functions of the  
14 employment position.

15 The essential functions of an employment  
16 position are basic fundamental duties of a job  
17 that a person must be able to perform to hold a  
18 particular position. Essential functions do not  
19 include marginal job duties of a position.

20 A job function may be considered  
21 essential for any of several reasons. These  
22 include but are not limited to the following:

23 One. The reason that the position exists  
24 is to perform that function.

25 Two. There are a limited number of

1 employees available among whom the performance  
2 of that job function can be distributed.

3 And 3. The job function is highly  
4 specialized, and the person in that position is  
5 hired for their expertise or ability to perform  
6 that particular job function.

7 In determining whether a particular job  
8 function is essential you may, along with all of  
9 the evidence that has been presented to you,  
10 consider the following factors.

11 One, the employer's judgment as to which  
12 functions of the job are essential. Sorry,  
13 that's i, not one.

14 j. Written job descriptions prepared by  
15 the employer for advertising or posting new  
16 position.

17 k. Written job descriptions prepared by  
18 the employer for use in interviewing applicants  
19 for the position.

20 l. The amount of time spent performing  
21 the function.

22 m. The consequences of not requiring the  
23 person holding the position to perform the  
24 function.

25 n. The terms of any collective

1 bargaining agreement.

2 o. The work experience of past employees  
3 who have held position.

4 And p. The work experience of current  
5 employees who hold similar positions.

6 An employee must have been able to  
7 perform all of the essential functions of the  
8 desired position either with or without  
9 reasonable accommodation at the time of their  
10 termination.

11 An employer may not base an employment  
12 decision on speculation that the employee's  
13 disability might worsen to the extent that they  
14 would not be a qualified individual at some time  
15 in the future.

16 On the other hand, an employer is not  
17 required to speculate that an employee's  
18 condition will improve if that employee is not  
19 able to fulfill all of the essential functions  
20 of the position at the time in question.

21 2.4. Failed to make a reasonable  
22 accommodation.

23 You must determine whether Dartmouth  
24 Health failed to make a reasonable accommodation  
25 for Dr. Porter by reassigning her to another

1 department instead of terminating her  
2 employment.

3 The term "reasonable accommodation" means  
4 making modifications to the workplace that  
5 allows a person with a disability to perform the  
6 essential functions of the job or allows a  
7 person with a disability to enjoy the same  
8 benefits and privileges as an employee without a  
9 disability.

10 A reasonable accommodation may include  
11 job restructuring, part-time or modified work  
12 schedules, reassignment to a vacant position, or  
13 other similar accommodations for individuals  
14 with disabilities. A reasonable accommodation  
15 does not require an employer to create a new  
16 position for an employee.

17 The term "reasonable accommodation" does  
18 not include efforts that can cause an undue  
19 hardship; an action requiring significant  
20 difficulty or expense on an employer. An  
21 employer must show special, typically case  
22 specific, circumstances to demonstrate undue  
23 hardship in a particular case.

24 An employer has a duty to make a  
25 reasonable accommodation for an employee if the

1 employer knows or reasonably should have known  
2 that the employee was disabled, even if the  
3 employee did not explicitly request an  
4 accommodation.

5 If the employer knows or should have  
6 known that the employee was disabled, the  
7 employer is obligated to engage in an  
8 interactive process with the employee to  
9 determine whether a possible reasonable  
10 accommodation exists. Both employer and  
11 employee must cooperate with this interactive  
12 process in good faith.

13 Neither side can prevail in this case  
14 simply because the other did not cooperate in  
15 the interactive process. However, you may  
16 consider whether the party cooperated in good  
17 faith in evaluating the merit of that party's  
18 claim that a reasonable accommodation did or did  
19 not exist.

20 An employer, by failing to engage in any  
21 sufficient interactive process, risks not  
22 discovering means by which an employee's  
23 disability could have been accommodated and  
24 thereby increases the chance of failing to  
25 reasonably accommodate an employee.

1                   3. Retaliation.

2                   The ADA prohibits an employer from  
3                   discriminating against an employee because the  
4                   employee has opposed an unlawful employment  
5                   practice under the ADA. This is called  
6                   retaliation. To establish retaliation  
7                   Dr. Porter must prove each of the following  
8                   elements by a preponderance of the evidence.

9                   First: Dr. Porter engaged in activity  
10                  protected by the ADA.

11                  Second: Dartmouth Health knew that  
12                  Dr. Porter engaged in protected activity.

13                  Third: Dartmouth Health took adverse  
14                  action against Dr. Porter.

15                  Fourth: The causal connection exists  
16                  between the adverse action and the protected  
17                  activity.

18                  3.1. Protected activity.

19                  A protected activity is an act that  
20                  opposes any perceived discriminatory practice  
21                  made unlawful by the ADA. Protected activity  
22                  includes making a request for a reasonable  
23                  accommodation.

24                  The parties have agreed on the first  
25                  element; that Dr. Porter made a reasonable



1 accommodation request. Thus, the first element  
2 is satisfied.

3 3.2. Aware of activity.

4 The parties have agreed on the second  
5 element; that Dartmouth Health was aware that  
6 Dr. Porter made a reasonable accommodation  
7 request seeking reassignment to the OB/GYN  
8 Department or the Radiology Department. Thus,  
9 the second element is satisfied.

10 3.3. Adverse action.

11 You must determine whether Dartmouth  
12 Health took adverse action against Dr. Porter by  
13 terminating her employment.

14 3.4. Causal connection.

15 You must determine whether there is a  
16 causal connection between Dr. Porter's  
17 reasonable accommodation request and Dartmouth  
18 Health's decision to terminate Dr. Porter's  
19 employment. Dr. Porter must prove that  
20 Dartmouth Health would not have terminated her  
21 employment but for her reasonable accommodation  
22 request.

23 To determine there is a causal connection  
24 between Dartmouth Health's decision to terminate  
25 Dr. Porter's employment and Dr. Porter's

1 reasonable accommodation request, you must  
2 decide that Dartmouth Health would not have  
3 terminated Dr. Porter if Dr. Porter had not made  
4 a reasonable accommodation request but  
5 everything else had been the same.

6 Dr. Porter does not need to prove that  
7 retaliation was the only or even the predominant  
8 factor that motivated Dartmouth Health. You may  
9 determine that other factors contributed to  
10 Dartmouth Health's decision to terminate  
11 Dr. Porter's employment. But, in order to  
12 return a verdict in favor of Dr. Porter on her  
13 ADA retaliation claim, you must conclude that  
14 she has proved by a preponderance of the  
15 evidence that, even if other factors contributed  
16 to the decision, Dartmouth Health would not have  
17 terminated her employment if she had not made a  
18 reasonable accommodation request.

19 Rehabilitation Act claim.

20 Dr. Porter has already brought disability  
21 discrimination claims under Section 504 of the  
22 Rehabilitation Act, 29 U.S.C. Section 794.  
23 Section 504 of the Rehabilitation Act applies to  
24 entities that receive federal funds, and it  
25 prohibits these entities from excluding or

1 discriminating against individuals based on  
2 their disability.

3 Dr. Porter has brought claims for  
4 discriminatory termination, failure to make a  
5 reasonable accommodation, and retaliation under  
6 Section 504 of the Rehabilitation Act. The  
7 elements and instructions for these claims are  
8 the same as those under the ADA. Thus, the  
9 instructions I previously gave you on disability  
10 discrimination under the ADA apply equally to  
11 the claims under Section 504 of the  
12 Rehabilitation Act.

13 Disability discrimination claims under  
14 New Hampshire state law.

15 In addition to the federal claims, there  
16 are also claims in this case for disability  
17 discrimination under New Hampshire's law against  
18 discrimination. New Hampshire state law  
19 prohibits discrimination in employment based on  
20 disability.

21 Dr. Porter has brought claims for  
22 discriminatory termination, failure to make a  
23 reasonable accommodation, and retaliation under  
24 the New Hampshire law against discrimination.  
25 The elements and instructions for these claims

1 are the same as those under the ADA. Thus, the  
2 instructions I previously gave you on disability  
3 discrimination under the ADA apply equally to  
4 the claims under the New Hampshire law against  
5 discrimination.

6 Disability discrimination claims under  
7 Vermont state law.

8 In addition to the federal claims and the  
9 claims under New Hampshire state law, there are  
10 also claims in this case for disability  
11 discrimination under Vermont's Fair Employment  
12 Practices Act (FEPA). Vermont state law  
13 prohibits discrimination in employment based on  
14 disability.

15 Dr. Porter has brought claims for  
16 discriminatory termination, failure to make a  
17 reasonable accommodation, and retaliation under  
18 Vermont's FEPA. The elements and instructions  
19 for these claims are mostly the same as those  
20 under the ADA. However, there is one important  
21 difference in the claim for discriminatory  
22 termination.

23 For the fourth element the FEPA uses the  
24 "motivating factor" test instead of the "because  
25 of" test used under the ADA. For example,

1 Dr. Porter must prove the following by a  
2 preponderance of the evidence:

3 First: Dartmouth Health is an employer  
4 subject to the FEPA.

5 Second: Dr. Porter has a disability  
6 within the meaning of FEPA.

7 Third: Dr. Porter was otherwise  
8 qualified to perform the essential functions of  
9 her job, either with or without reasonable  
10 accommodation.

11 Fourth: Dr. Porter's disability was a  
12 motivating factor in Dartmouth Health's decision  
13 to terminate her employment.

14 Under the "motivating factor" test an  
15 employee must prove that their disability was a  
16 motivating factor that prompted the employer to  
17 terminate the employment. It is not necessary  
18 for the employee to prove that disability was  
19 the sole or exclusive reason for the employer's  
20 decision. It is sufficient if the employee  
21 proves that the alleged disability was a  
22 motivating factor in the employer's decision.

23 A motivating factor is a factor that  
24 played some part in an employer's adverse  
25 employment action. Under the "motivating

1 factor" test an employer cannot avoid liability  
2 by proving that it would still have taken the  
3 same adverse action in the absence of  
4 discriminatory motivation. This is a difference  
5 between "motivating factor" test and the  
6 "because of" test.

7 You should apply the "motivating factor"  
8 test, not the "because of" test to Dr. Porter's  
9 claim for discriminatory termination under the  
10 FEPA. With this exception, the instructions I  
11 previously gave you on disability discrimination  
12 under the ADA regarding failure to make a  
13 reasonable accommodation and retaliation apply  
14 equally to the claims under the FEPA.

15 Wrongful discharge under New Hampshire  
16 law.

17 Based on Dartmouth Health's termination  
18 of Dr. Porter's employment at  
19 Dartmouth-Hitchcock Medical Center, Dr. Porter  
20 has brought a claim for wrongful discharge  
21 against Dartmouth Health under New Hampshire  
22 law.

23 The prevailing rule in New Hampshire is  
24 that where, as here, there is no employment  
25 contract between employer and employee, the

1 relationship is termed "at will".

2 In an at-will employment situation both  
3 parties are generally free to terminate the  
4 employment relationship at any time with or  
5 without cause, and it is implied that the  
6 parties will carry out their obligations in good  
7 faith.

8 But there is an exception to this at-will  
9 rule. An employer termination of an employee  
10 that is motivated by bad faith or malice, or is  
11 based on retaliation, is not in the best  
12 interest of the economic system of the public  
13 good and is therefore unlawful. An employer's  
14 interest in running his business as he sees fit  
15 must be balanced against the interest of the  
16 employee in maintaining his employment and the  
17 public's interest in maintaining a proper  
18 balance between the two.

19 In order to establish a claim for  
20 wrongful discharge under New Hampshire law,  
21 Dr. Porter must prove the following two elements  
22 by a preponderance of the evidence:

23 First: Dartmouth Health's termination of  
24 Dr. Porter was motivated by bad faith, malice,  
25 or retaliation.

1 And, Second: Dartmouth Health terminated  
2 Dr. Porter because she performed one or more  
3 acts that public policy would encourage.

4 One. Termination motivated by bad faith,  
5 malice, or retaliation.

6 For purposes of this claim, bad faith is  
7 the equivalent of malice and may be established  
8 where, one, an employee is discharged for  
9 pursuing policies condoned by the employer; two,  
10 the record does not support the stated reason  
11 for the discharge; or, three, disparate  
12 treatment was administered to a similarly  
13 situated employee.

14 Bad faith can also be discerned from the  
15 course of events surrounding an employee's  
16 discharge, the manner in which the plaintiff was  
17 discharged, or shifting reasons for an  
18 employee's termination.

19 Stated another way, malice or bad faith  
20 may be shown where the employer's decision to  
21 terminate an employee was without reasonable  
22 cause or excuse as the facts would have appeared  
23 to a reasonable person and that the termination  
24 was willful and intentional. That is, the  
25 employer knew that the termination was



1 unreasonable and still decided to terminate the  
2 employee's employment, or that the termination  
3 was motivated by ill will or a purpose to  
4 harass.

5 Bad faith or malice may therefore be  
6 established by proof that the evidence does not  
7 support the stated reason for the discharge.

8 The general meaning of retaliation is the  
9 act of doing someone harm in return for actual  
10 or perceived injuries or wrongs. In other  
11 words, revenge.

12 Two. Acts that public policy would  
13 encourage.

14 Public policy as used in this claim  
15 includes a wide range of society goals,  
16 including safety and public welfare, protection  
17 of an at-will's employee's promised  
18 compensation, and good faith reporting of  
19 reasonably perceived improper activity.

20 The employee need not show a strong and  
21 clear public policy, and the public policy may  
22 be based on statutory or non-statutory policies  
23 at the state or federal level. An employee's  
24 mere expression of disagreement with a  
25 management decision, however, is not an act

1           protected by public policy.

2           Moreover, the public policy exception to  
3           termination of at-will employment does not  
4           deprive an employer of the right to make  
5           business decisions which are not necessary to  
6           effectuate the efficient and profitable  
7           operation of its business, nor does the public  
8           policy exception interfere with an employer's  
9           ability to hire and retain those individuals  
10          best qualified for the job.

11          An example of a case where an employee is  
12          terminated for doing an act that public policy  
13          would encourage is an employee being terminated  
14          for refusing to provide to his or her employer  
15          private medical reports and personal health  
16          information on patients.

17          The second example is an employee  
18          terminated for missing work because they  
19          reported to jury duty.

20          A third example is an employee being  
21          terminated for protecting employees who worked  
22          under him from workplace hazards that could  
23          cause serious physical harm to those employees.

24          Other examples of acts that public policy  
25          would encourage could be reporting physician

1           conduct that's illegal, fraudulent, unethical,  
2           or unlawful to patients; ensuring that a medical  
3           provider or medical facility obtain patient  
4           consent before performing procedures on  
5           patients, and objecting to improper patient  
6           billing procedures. In these cases if the  
7           termination is because of the act that public  
8           policy encourages and the employer acted with  
9           malice and bad faith or in retaliation, the  
10          employee is entitled to recover damages for  
11          wrongful termination.

12                 It is your job to determine if Dartmouth  
13          Health terminated Dr. Porter because of her  
14          performance of one or more acts that public  
15          policy would encourage. In determining whether  
16          Dr. Porter performed an act that public policy  
17          would encourage, you are not limited to the  
18          above examples, nor must you find that the facts  
19          support the above examples in this case.

20                 In order to find in favor of Dr. Porter  
21          on this claim, you not only must find that  
22          Dr. Porter performed one or more acts that  
23          public policy would encourage and that Dartmouth  
24          Health's termination of Dr. Porter was motivated  
25          by bad faith, malice, and retaliation, you must

1 also find that Dr. Porter was terminated because  
2 of her performance of an act that public policy  
3 would encourage.

4 Thus, Dr. Porter must show a causal link  
5 between her performance of an act that public  
6 policy would encourage and her termination.

7 Damages.

8 If you decide in favor of Dartmouth  
9 Health on all claims, you will not consider  
10 these instructions about damages. But if you  
11 decide for Dr. Porter on any claim, you must  
12 determine the amount of money that will  
13 compensate her for each item of harm that was  
14 caused by Dartmouth Health's conduct. This  
15 compensation is called damages.

16 Please keep in mind the following general  
17 principles as you deliberate. Remember that  
18 Dr. Porter has the burden of proving damages by  
19 a preponderance of the evidence. Damages may  
20 not be based on sympathy, speculation, or  
21 guesswork. In making your decision, you should  
22 be guided by the evidence, common sense, and  
23 your best judgment.

24 Economic and noneconomic damages.

25 Damages for Dr. Porter's claims can fall

1 into two different categories; economic damages  
2 and noneconomic damages.

3 Economic damages includes such items as  
4 lost income and medical expenses. Non-economic  
5 damages include such items as lost enjoyment of  
6 life, mental anguish, pain and suffering,  
7 disability, and disfigurement. These damages  
8 may include compensation for past harm and  
9 future harm, depending on the evidence. If you  
10 find that Dr. Porter is entitled to damages, you  
11 must determine the total amount and place that  
12 amount on the verdict form.

13 There is no precise standard for  
14 calculating these damages. Your damages  
15 determination must be just and reasonable in  
16 light of the evidence. In determining the  
17 damages that Dr. Porter has suffered as a result  
18 of her injuries, you should consider the  
19 following items:

20 Dr. Porter is entitled to damages for any  
21 earnings lost in the past and any probable loss  
22 of ability to earn money in the future caused by  
23 Dartmouth Health's conduct. When considering  
24 Dr. Porter's future earnings, you should  
25 consider Dr. Porter's expected working lifetime.

1 Dr. Porter is entitled to damages for any  
2 lost enjoyment of life, mental anguish, and pain  
3 and suffering caused by Dartmouth Health's  
4 conduct. These damages may include any pain,  
5 discomfort, fears, anxiety, humiliation, lost  
6 enjoyment of life's activities, and any other  
7 mental and emotional distress suffered by her in  
8 the past or likely to be suffered in the future.

9 Mitigation of damages.

10 Dartmouth Health claims that Dr. Porter  
11 has failed to mitigate, or minimize, her  
12 damages. A plaintiff ordinarily has a general  
13 duty to mitigate the damages she incurs, meaning  
14 she has a duty to take steps to try to minimize  
15 the harm or prevent it from increasing further.  
16 In this context, that means Dr. Porter has a  
17 duty to attempt to secure or to secure  
18 employment that is a suitable alternative to her  
19 employment at Dartmouth Health. This duty  
20 applies only to those damages that Dr. Porter  
21 could have avoided with reasonable effort and  
22 without undue risk, burden, or expense, as the  
23 duty to mitigate requires only reasonable,  
24 practical care and diligence, not extraordinary  
25 measures.

1           The burden is on Dartmouth Health to  
2           prove this affirmative defense by a  
3           preponderance of the evidence. As part of  
4           bearing this burden, Dartmouth Health must  
5           present evidence not only that Dr. Porter did  
6           not make reasonable efforts to obtain employment  
7           but also that suitable work existed. To sustain  
8           its burden Dartmouth Health must present  
9           concrete evidence. Mere speculation is not  
10          sufficient.

11          If you find that Dr. Porter failed to  
12          mitigate her damages, you must reduce her award  
13          of damages, if any, by the amount you find she  
14          could have avoided.

15          Punitive damages.

16          Punitive damages are meant to punish a  
17          party for its clearly outrageous conduct and to  
18          stop others from acting similarly in the future.  
19          In order to award punitive damages, you must  
20          find two things.

21          First, you must find that Dartmouth  
22          Health's wrongful conduct was outrageously  
23          reprehensible. That is, that the conduct,  
24          whether acts or failures to act, was egregious,  
25          morally deserving of blame, to a degree of

1 outrage frequently associated with a crime.

2 Second, you must find that Dartmouth  
3 Health acted with malice. You may find malice  
4 if you find that Dartmouth Health's  
5 reprehensible conduct was intentional and  
6 deliberate. That is, that the conduct was the  
7 result of Dartmouth Health's bad motive, ill  
8 will, or personal spite or hatred toward  
9 Dr. Porter. You may also find malice even if  
10 Dartmouth Health's motivation behind the  
11 intentional, outrageous conduct was to benefit  
12 itself rather than to harm Dr. Porter.

13 Alternatively, you may find malice if  
14 Dartmouth Health's wrongful conduct was not  
15 intentional but instead was done with a reckless  
16 or wanton disregard of the substantial  
17 likelihood that it would cause egregious harm to  
18 Dr. Porter. That is, if Dartmouth Health acted  
19 or failed to act with conscious and deliberate  
20 disregard of a known, substantial, and  
21 intolerable risk of harm to Dr. Porter, with the  
22 knowledge that the conduct was substantially  
23 certain to result in the threatened harm.

24 Where the defendant is a corporation, as  
25 is the case here, in order to find that the



1 corporation must pay punitive damages you must  
2 find that conduct justifying punitive damages  
3 was corporate conduct or was conduct permitted  
4 by a corporation.

5 Where the management of the corporation  
6 was involved in the conduct itself, it may be  
7 considered to be corporate conduct. Where the  
8 management of the corporation has knowledge of  
9 wrongful conduct by lower-level employees, the  
10 corporation may be determined to have permitted  
11 the conduct.

12 If you find either corporate conduct or  
13 conduct permitted by the corporation, you may  
14 find the corporation must pay punitive damages.

15 In determining the amount of punitive  
16 damages to award, if any, you may consider such  
17 factors as the nature of Dartmouth Health's  
18 conduct, the nature of the resulting harm to  
19 Dr. Porter, Dartmouth Health's wealth or  
20 financial status, and the degree of malice or  
21 wantonness in its acts.

22 Remaining damages issues.

23 It is solely the province of the jury to  
24 decide the amount of any damages award. I am  
25 giving you these damages instructions so you

1 will know how to proceed if you reach this point  
2 in your deliberations. But by giving you these  
3 instructions I do not intend to suggest that an  
4 award is appropriate or what the amount of that  
5 award should be.

6 Where the amount of damages can be  
7 calculated in specific dollar terms, the parties  
8 seeking damages must present evidence to  
9 demonstrate the appropriate amount. With  
10 certain types of damages, however, there is no  
11 precise measurement, and it is up to you to  
12 decide what is fair monetary compensation for  
13 those damages. Under no circumstances may you  
14 award damages that are speculative or  
15 conjectural.

16 I remind you that any amount of recovery  
17 that may have been suggested by the attorneys is  
18 not evidence. Moreover, you need not adopt the  
19 approaches the attorneys have suggested for  
20 calculating damages. As the jury it is your  
21 obligation to arrive at an amount which is  
22 supported by the evidence and fair to both  
23 parties. The amount of damages, if any, is a  
24 determination for the jury.

25 You should not add any sum for interest

1 to the damages awarded in this case. The Court  
2 will make such award, if appropriate.

3 Similarly, you must not include in your  
4 reward any costs that Dr. Porter may or may not  
5 have incurred due to her filing of this lawsuit  
6 or her attorney's fees. These are matters for  
7 the Court.

8 You should not award damages for one item  
9 that duplicates an award for another item. In  
10 other words, a party is entitled to only one  
11 recovery for his or her damages.

12 Insurance and taxes.

13 You should not speculate about whether  
14 Dartmouth Health or Dr. Porter has any insurance  
15 that might cover or has covered any damages that  
16 you find Dr. Porter has experienced. You also  
17 should not speculate about what taxes Dr. Porter  
18 might owe on any damage award.

19 You have heard testimony from  
20 Dr. Bancroft that Dr. Porter's damages include  
21 amounts owed in taxes on any damages award. You  
22 may or may not take this into account in  
23 assessing the amount of Dr. Porter's damages, if  
24 any.

25 The rules that jurors are not to

1 speculate about insurance and taxes are special  
2 rules that apply to lawsuits. Those issues are  
3 not relevant to your task here. Your job is to  
4 award the amount of damages that you determine  
5 has been established by the evidence presented  
6 to you. Any other issues that have to be  
7 resolved are my job, not yours.

8 Final instructions.

9 This completes my instructions to the  
10 jury. I will now provide a copy of these  
11 instructions to you -- you already have a  
12 copy -- and you will retire to the jury room to  
13 deliberate in privacy about the issues in this  
14 case.

15 I will also provide a verdict form to  
16 guide you in your deliberations. The answer to  
17 each question on the form must be the unanimous  
18 answer of the jury. This means you cannot  
19 answer a question on the verdict form unless and  
20 until all 12 of you agree on the answer. Each  
21 question Numbered 1 through 6 must be answered.

22 You will also receive the exhibits which  
23 are admitted into evidence.

24 I appoint Kattie Lafontaine as your  
25 foreperson. She will be responsible for making

1           sure that deliberations occur in an orderly  
2           fashion and that every juror has an opportunity  
3           to participate.

4                     She will record the unanimous answers of  
5           the jury on the verdict form and date and sign  
6           the jury form. She will also be your  
7           spokesperson here in court.

8                     If you need to communicate with the  
9           Court, please do so in writing. I will then  
10          confer with the lawyers about your question and  
11          send a written response to you.

12                    Please advise the court officer after you  
13          reach a verdict but do not tell the court  
14          officer or anyone else what the verdict is until  
15          you return to the courtroom, at which time I  
16          will receive the verdict form from your  
17          foreperson.

18                    So that concludes the instructions. At  
19          this time I'll ask that the jury retire to the  
20          deliberation room, and the exhibits will be  
21          provided to you for your consideration of the  
22          case.

23                    THE CLERK: All rise for the jury.

24                    (The jury left the courtroom at  
25          2:13 p.m.)

1 THE CLERK: Please be seated.

2 THE COURT: Okay, so at this time I'll  
3 take any objections from the parties to the  
4 instructions as given.

5 MR. JONES: Only with regard to the issue  
6 with regard to New Hampshire enhanced  
7 compensatory damages, renewing that issue.

8 THE COURT: Yes, okay. Thank you.

9 Mr. Schroeder?

10 MR. SCHROEDER: Your Honor, not to review  
11 all the previously stated on objections related  
12 to the jury instructions, included but not  
13 limited to the instructions regarding the ADA,  
14 reassignment to a vacant position, we  
15 incorporate herein all of the prior objections  
16 that we've stated on the record.

17 THE COURT: Okay. All right. Thank you.

18 Anything else from either side at this  
19 point?

20 MR. SCHROEDER: Just logistics, your  
21 Honor.

22 THE COURT: Yes.

23 MR. SCHROEDER: Where you would like us  
24 to remain? What's the assigned period? How  
25 close you would like us to remain? Just your

1 general decorum rules on that.

2 THE COURT: I think so long as Mr. Howe  
3 has cellphones, contact information for you.  
4 Cellphone I think probably is the best. You  
5 certainly don't have to stay here in the  
6 courtroom. You can leave the building  
7 certainly, but as long as you can be back in a  
8 five- to ten-minute time period if you do get a  
9 call from me about a note, that would be fine.

10 MR. SCHROEDER: Should we report back  
11 here at 4:30 or -- well, you tell us.

12 THE COURT: Right. So I don't -- you  
13 know, I haven't spoken to them.

14 Well, I haven't spoken to them about  
15 that, about how long they want to deliberate  
16 for. As I mentioned to you this morning, I  
17 probably should mention that to them at this  
18 time, so that will answer your question.

19 So I'll ask for the jury to be brought  
20 back in so I can speak to them about that.

21 THE CLERK: All rise for the jury.

22 (The jury entered the courtroom at  
23 2:15 p.m.)

24 THE CLERK: Please be seated.

25 THE COURT: So you may be wondering how

1 long you would be deliberating. That's up to  
2 you ultimately, but in terms of how far you go  
3 into the evening it's up to you.

4 If you would like to deliberate past, say  
5 the 4:30 cutoff time, that's entirely up to you;  
6 whatever decision you make in that regard.

7 If as a group you determine to stop  
8 deliberating at any point in time this evening,  
9 I'd ask that you provide a note to the court  
10 security officer advising me that that is what  
11 you intend to do, and then I'll bring you back  
12 into court briefly to speak to you before you  
13 leave for the evening.

14 And then if your deliberations carry over  
15 until tomorrow, then 9 a.m. if you would come  
16 back to court and report to the jury room as you  
17 always have, and you will not be seeing us or  
18 the attorneys during your deliberations. Okay?

19 Any issues that arise during your  
20 deliberations, as I say, provide a note to the  
21 court security officer, and it will be taken up  
22 here.

23 Okay. Thank you.

24 THE CLERK: All rise for the jury.

25 (The jury left the courtroom at



1 2:17 p.m.)

2 THE CLERK: Please be seated.

3 THE COURT: So, having said that, I don't  
4 know that I'll direct you to come back at 4:30  
5 because it may be too early, it may be too late.  
6 I'll let you -- who knows, so we'll be in touch  
7 with you.

8 MR. SCHROEDER: Thank you, your Honor.

9 THE COURT: Okay. Thank you.

10 (The jury started their deliberations at  
11 2:18 p.m.)

12 (A note was received from the jury, and  
13 the following is in open court without the jury  
14 present at 4:31 p.m.)

15 THE COURT: Okay, so we received a note,  
16 and I'm going to read the note to you. It's  
17 written by the foreperson, and it simply reads:

18 We collectively would like to leave at  
19 4:30 p.m. tonight.

20 So I called you back to let you know  
21 that, and now I'm going to call the jury in and  
22 I'm going to honor their request.

23 (The jury entered the courtroom at  
24 4:32 p.m.)

25 THE COURT: Okay, so I received your

1 note, and I shared the contents of the note with  
2 counsel. So, of course, you can leave at 4:30  
3 tonight.

4 So as you know, you are in deliberations  
5 now so really now, more than ever, it's  
6 absolutely critical that you not talk to anyone  
7 about the case or take in any other information  
8 about the case or let anyone talk to you about  
9 the case. You shouldn't speak to family or  
10 friends, court officers; no one about the case.

11 So you'll return tomorrow at 9 a.m., and  
12 please remember that you cannot resume  
13 deliberations unless everyone is present. Okay?

14 All right. Well, have a good evening.

15 THE CLERK: All rise for the jury.

16 (The jury left the courtroom at  
17 4:33 p.m.)

18 THE COURT: I'm assuming we're all good  
19 at this point?

20 (All counsel nodded their heads.)

21 THE COURT: All right. Have a good  
22 evening.

23 (End of court proceedings on April 8,  
24 2025, at 4:33 p.m.)  
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C E R T I F I C A T E

I, SARAH M. BENTLEY, Certified Court Reporter, Registered Professional Reporter and Notary Public, do hereby certify that the said proceedings were taken in machine shorthand by me at the time and place aforesaid and were thereafter reduced to typewritten form under my direction, Pages 1 - 195; that the foregoing is a true, complete, and correct transcript of said proceedings.

I further certify that I am not employed by, related to, nor counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature and seal this 31st day of May, 2025.

/s/ Sarah M. Bentley, RPR  
SARAH M. BENTLEY, CCR-B-1745